LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
SEP 20 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 358

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner*

v.

CIRACO MANEJA, ET AL., *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUFUS G. POOLE,
1625 K Street, N. W.
Washington 6, D. C.

LIVINGSTON JENKS,
Bank of Hawaii Bldg.
Honolulu 1, T.H.

MILTON C. DENBO
1625 K Street, N. W.
Washington 6, D. C.

PHILIP LEVY
1625 K Street, N. W.
Washington 6, D. C.

ERNEST C. MOORE, JR.
302 Castle & Cooke Bldg.
Honolulu, T.H.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

INDEX

PAGE

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED MAY 5, 1954 1

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED MAY 5, 1954 22

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JUNE 24, 1954, UPON PETITION FOR REHEARING 22

ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JUNE 24, 1954, DENYING PETITION FOR REHEARING 23

OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, DATED MAY 3, 1951* 24

OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 10, 1949 98

---

* The Findings of Fact and Conclusions of Law of the District Court are printed at pages 190 *et seq.* and 308 *et seq.* in the record used in the Court of Appeals, nine copies of which have been filed with the Clerk of this Court pursuant to Rule 21(4).

In The

Supreme Court of the United States

October Term, 1954

No. .....

Waialua Agricultural Company, Limited, *Petitioner*

v.

Ciraco Maneja, et al., *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinion of United States Court of Appeals for the Ninth Circuit, Dated May 5, 1954

No. 13,114—Opinion—May 5, 1954

Waialua Agricultural Company, Limited, *Appellant*,

vs.

Ciraco Maneja, et al., *Appellees*.

Appeal from the United States District Court for the District of Hawaii

---

Before HEALY, BONE, and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This case must be reversed for error in approach. Waialua initiated the procedure by petition for declaratory judgment. The trial court, misled by the nature of the cause and the attitudes of the parties, decided the wrong issue.

The status of Waialua was tried out. It was contended by Waialua that it was engaged in agriculture, and therefore all of its employees were exempt from application of the statute. The trial court, in its first declaration, which was reversed for lack of findings, and in its present declaration and judgment, took the converse position. It has held that Wailua, through corporate affiliations, interlocking directorates and factor relationships, was a manufacturer of refined sugar on the mainland, and there engaged in interstate and foreign commerce.[1]

By agreement of all parties and the Department of Labor, that Court finds that all employees of Waialua except one group[2] "are engaged in commerce or in the production of goods for commerce." Therefore, it was concluded that every employee of Waialua on Oahu, Territory of Hawaii, was subject to the drastic provisions of the Act for each work week in which he did not spend every employed hour in an activity such as planting, irrigating, cultivating, ratooning or cutting and loading cane.[3] In pursuit of the fallacy so induced, the Court refused to describe each employee who harvested the crop by reduc-

---

[1] The trial court found that Waialua does not "directly engage in any sugar refining operation." 97 F.Supp. 198, 203.

[2] This group is composed of employees who perform the work of repairing and maintaining dwelling houses in the mill village. These employees the Court found, independently of agreement, were employed in the production of goods for commerce. 97 F. Supp. 198, 226-232.

[3] These activities are particularized by the trial court at 97 F.Supp. 198, 219, paragraph [3].

ing cane to raw sugar and molasses, an operation essential to its preservation, as an agricultural worker.[4]

Thus the trial court did not give effect to the language of the statute which excludes from its operation anyone "employed in agriculture"[5] and defines "agriculture" to include "farming in all its branches and among other things * * * the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural and horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."[6]

After a remand upon a previous appeal,[7] on motion of Waialua, the International Union was eliminated and its Secretary, Jack Hall, stricken from the defendants. The representative character of the original proceeding was

---

[4] The trial court, disregarding an express direction of this Court, allowed the processing exemption, which is beside the point. The activity was excluded by the terms of the Act. In its previous opinion, 178 F.2d 603, this Court stated: "Not only was it the desire to exempt processing as a part of the harvesting done by a farmer or on a farm, but also processing done by a third party. These provisions are not alternative or mutually exclusive, and should be liberally construed for the reasons given by this Court in McComb vs. Hunt Foods, Inc., 9 Cir., 167 F.2d 905, 908." (page 609). The processing exemption, 29 U.S.C.A. § 207(c), is directed primarily toward that "processing done by a third party." See also Walling vs. Peacock Corporation, 58 F.Supp. 880, 883; Redlands Foothill Groves vs. Jacobs, 30 F.Supp. 995, 1006.

[5] 29 U.S.C.A. § 213(a)(6). "* * the raising and harvesting of sugar were specifically given consideration by Congress on account of the immense importance to the economy of this country as a whole." Waialua Agricultural Company, Limited vs. Maneja, 9 Cir., 178 F.2d 603, 608, paragraph [6-8].

[6] 29 U.S.C.A. § 203(f).

[7] Waialua Agricultural Company, Limited vs. Maneja, 9 Cir., 178 F.2d 603, cert. den., 339 U.S. 920.

also abandoned. The individual workers, most of whom were retainers and dependents of Waialua although union members, were permitted to file a so-called cross-complaint, praying for relief in sums of money, and this time several of these individual employees gave testimony as to the kind of work each did. None of these devices, adopted to meet criticism of this Court, changed the fundamental character of the proceeding. The individual employee cross-complainants still seem "pawns in this battle of the demi-gods." Waialua seems to act to preserve relations with the Union and a federal bureau, as a policy. Practically all facts are agreed and, as above noted, constitutional and jurisdictional conclusions as to coverage were accepted. Thereby, emphasis was placed upon the wrong problems.[8] This conjugation by consent removes the cause from the class of "cases and controversies" and is an abuse of declaratory judgment procedure. The only bitterly partisan litigant is an executive bureau not named in the record as a party. Notwithstanding a plain warning of this Court upon the last appeal that such evidence was impertinent to the whole question as to whether the individual employee was an "agricultural worker," the parties introduced at this trial and the Court adopted as a basis for decision two treatises. These were entitled, respectively, "Labor in the Territory of Hawaii, 1939" [9] and "The Economy of Hawaii in 1947," [10] studies made under the supervision of a department of the government,

---

[8] The suggestion of the trial court in one opinion that the exclusion of agriculture would free farmers from the "oppressive child labor" provisions of the Act need not be too much regarded. Such a problem does not exist. And we have come a long way from sound thinking in America if it be suggested that a farm boy should not work on a farm. Of course, the bureaucrats could take much better care of him.

[9] James H. Shoemaker, U.S. Bureau of Labor Statistics, United States Government Printing Office, 1940.

[10] Bulletin No. 926, United States Department of Labor, United States Government Printing Office, 1948.

which, as noted above, took an active part not only in the trial court, but on both appeals.

Thus a false issue was created. Instead of concern with the question of who was employed in agriculture, the attention of the Court was deflected to a consideration of membership of Waialua in a non-profit sugar refining and marketing cooperative called "California & Hawaiian Sugar Refining Corporation, Ltd.", of California, which was engaged in the manufacturing business of refining raw sugar, marketing the product, and transporting the refined sugar to the consumers.[11] But all the activities of the latter were carried on upon the mainland. No one of

---

[11] A similar contention was made by the Administrator of the Wage and Hour Division, as a bitterly partisan litigant under the guise of amicus curiae in Miller Hatcheries, Inc. vs. Boyer, 8 Cir., 131 F.2d 283, 285, where Judge Johnsen, in an illuminating opinion, held that employees of a commercial hatchery were excluded because "employed in agriculture." There the Administrator contended "that the hatching of baby chicks by a commercial hatchery is an industrialized and highly specialized activity which does not itself have any direct connection with 'farming operations'; that the economic function of such an urban establishment is completely disassociated from the agricultural activities," that "thus transposed from a farm to a commercial establishment it ceases to be a technical farming activity" and that "the attributes of farm labor which justify its exclusion * * * ought not to be regarded" as extending to a commercial operation.

This compares with the contentions of the Administrator here: "To accomplish its purpose of producing raw sugar, appellant plainly engages in many separate and distinct enterprises appropriate to that end, including manufacturing and transportation, as well as farming. This integration of business operations neither conceals the essential nonagricultural character of appellant's manufacturing functions nor submerges the fact that appellant, in operating a hybrid type of business, has assumed the functions of a manufacturer and a railroad company, as well as those of a farmer. * * * Just as the chain store cannot obtain the retail exemption for its central office and warehouse merely because the services of those units are restricted to exempt retail outlets, so here, appellant cannot achieve exemption for its separate manufacturing function and its railroad activities simply because it utilizes them only for the products of its farm."

its employees is here involved. None of the workers of Waialua was employed by the cooperative.

If the pertinent question of employment in farming had been considered instead, then the language of the statute defining such employees would have been given effect.[12]

The decisions of this Court bear out the breadth of the exclusion of agricultural workers. Dofflemyer vs. National Labor Relations Board, 9 Cir., 206 F.2d 813 (Judge Healy) shows that technical distinctions should not be used to circumscribe the words "farmer" and "farm" as used in the Act. The necessity for immediate processing of a farm product is of great force in emphasizing the scope of the agricultural exclusion, according to Judge Bone, writing for the majority in McComb vs. Hunt Foods, 9 Cir., 167 F.2d 905, where the interpretations of three different district courts in widely separated agricultural areas of the mainland are followed. There the Court said:

> "'The policy of protection to the growers of "perishable and seasonal fresh fruits" is of as much force as that of the protection of general industrial workers. The objective of a uniform rule for hours and wages in manufacturing should not be allowed to prevail over the paramount necessity of garnering and preserving fruits and grains when Congress equally recognized both in the Act. The hypertechnical reasoning concerning "exceptions" and "exemptions" has no place here. A direct expression of non-applicability constitutes neither.'

---

[12] In an interesting case parallel to this in another food supplying industry, the Court of Appeals of the Third Circuit held, in an able opinion by Judge Maris, that all employees necessary to carrying on a fishery and fish processing activities were "exempt by the plain language of Section 13(a)(5) of the Act." McComb vs. Consolidated Fisheries Co., 3 Cir., 174 F.2d 74, 78. It should be marked with red on the margin of this case that the Administrator was there contending that all employees of a farmer, including those engaged in first processing, were excluded by the language, but that the exemption to fish processors was much narrower.

> "This is but another way of saying that if the business operations claimed to be exempt are found to fall within the exempt classification, the statute is, as to them, a 'remedial' statute. We agree with the lower court that no formalistic characterization should be permitted in dealing with any of these clauses since the plain intention of the statute should be carried out." (page 906).

The trial court was thus in error in requiring Waialua to prove beyond peradventure the affirmative of the proposition that each worker was employed in agriculture and in activities by a farmer and on a farm. By an unwarrantedly strict construction, Waialua was required to establish exemptions beyond a reasonable doubt, as though it were negativing a jurisdictional proviso in an indictment.

Upon the former appeal, to which reference has been made, the Court questioned the aptness of the declaratory proceeding, but remanded because the findings were not sufficient to support any judgment. The findings before us are now meticulous and exact as to the hours and type of work performed by each worker defendant during each work week in question. However, the trial court failed to find many vital facts which the record, as we view it, bears out, and made many findings which are clearly erroneous. For these reasons alone, the cause must be reversed.

A vital finding contains the implication that sugar cane can be stored in Hawaii three or four days without spoiling.[13] In fact, a delay of three or four hours is apparently deleterious, and for best results the cane, after cutting, should move continuously from field to crushing mill.[14]

---

[13] 97 F.Supp. 198, 203.

[14] "Sugar cane is highly perishable * * * and starts to deteriorate immediately after harvesting. To avoid serious losses, it must be processed into sugar, syrup or molasses within a few hours after it has been burned or severed from the ground." Stipulation of Fact, Part I, § 4.

The Court concludes that no worker at the crushing mill is employed in agriculture but is exempt only insofar as he assists in first processing. If necessity for immediate treatment for preservation had been found, the Court would have been impelled to find an employee at the mill was engaged in "harvesting" an agricultural product. The Court found transportation of cane from fields to cars was farming, but carrying of cane on cars drawn by a locomotive from loading points to the mill was "railroading" and transportation in commerce. Again, the railroad and its crew performed no other kinds of transportation, and therefore what each did was "harvesting." The complete operation was vitally necessary to put the crop into a form in which it would not spoil and, as "raw sugar," could be transported to the mainland for manufacturing. Any activity of any employee which assisted in this operation, whether furnishing power to the mill or hauling cane from field to mill, fell within the express word "harvesting" used in the enactment. Such a finding was not made. Those which were made were erroneous.

Even if it could have been concluded that these activities were not "harvesting," they were nevertheless carried on by a "farmer."[15] Furthermore, such activities were performed "on a farm." On either of these independent grounds, workers so employed were excluded by the enactment.

But the Court failed to find that Waialua was a farmer.[16] The record and stipulations show conclusively that

---

[15] Employees of a "farmer" who work in or out of a store, transporting, packing and selling plants in connection with a wholesale and retail outlet located in a city four miles from the "farm" are held to be employed in agriculture. Walling vs. Rocklin, 8 Cir., 132 F.2d 3. "The raw products were at most being prepared for market in connection with the business of producing them." (page 6).

[16] The trial court held, contrary to the stipulations and evidence, that Waialua "assumed a variety of functions, including those of farmer, carrier, manufacturer, shipper, and operator of village communities." 97 F.Supp. 198, 218.

all activities of Waialua upon the island of Oahu were concerned with growing, cultivating and harvesting sugar cane. It should have been found that Waialua was a farmer, and all workers performing functions for it on the plantation were employees of a farmer. It should have been found that transportation of cane to the mill and the crushing and drying of the raw sugar therefrom were activities performed by a farmer as incidents to and in conjunction with farming operations, including harvesting, preparation for market and delivery to storage. Findings of fact which have contrary implications are clearly erroneous.

The trial court also found neither railroad nor crushing mill were "on a farm."[17] The admissions, maps and other exhibits indicate all the activities of employees of Waialua were carried on within the boundaries of a single parcel of land described as a "plantation."

The railroad and the mill[18] were located upon a plot of ground and appurtenances all of which were in exclusive possession of Waialua. Practically all the area was also in its "ownership,"[19] although some acreage was leased and one field was connected with the main body by a right of way for moving its agricultural equipment, supplies and sugar cane. By far the greater percentage of the ground in the area was devoted to raising and harvesting of sugar cane in a year round process as an inte-

---

[17] The trial court apparently confines the meaning of the word "farm" to the fields upon which cane is actually grown, for it is pointedly said in the opinion, "Obviously cane is not grown on the right-of-way occupied by the fifty-six miles of permanent main line railroad track." 97 F.Supp. 198, 222. Cane probably does not grow on roads where ox teams hauled cane.

[18] The trial court's opinion states that the mill was on the plantation. 97 F.Supp. 198, 204.

[19] Discussion of the peculiar land system of Hawaii is not necessary.

grated operation. This situation dictates that the locus in quo be found to be a "farm." [20]

If then the particular activity of an employee was neither "cultivation and tillage of the soil" or "the production, growing and harvesting" of this crop, he was engaged in a practice performed "by a farmer or on a farm" under the conditions set up in the statute.[21]

Misled by the apparent wholehearted agreement as to the constitutional and jurisdictional conclusion regarding preparation of goods for commerce, the trial court inferred that a worker engaged in any operation or practice

---

[20] National Labor Relations Board vs. John W. Campbell, Inc., 5 Cir., 159 F.2d 184, 187: "The argument that Respondent has 1,000 acres planted in tomatoes and grows packs and markets many carloads in a season and, because of the very nature and size of its operation, should be held to be engaged in an industrial enterprise as distinguished from the pastoral pursuits of a farmer, will not do. The exemption was not restricted to the forty-acres-and-a-mule farmer. It is not measured by the magnitude of his planting nor in the prolificacy of his harvest. In Larson v. Ives Dairy Co., 5 Cir., 154 F.2d 701, 702, we said: 'Here, however, there is but a single enterprise, and that a dairy farm. * * * The size of the farm, of course, does not matter—it is still a dairy farm.' Here, also, the growing, harvesting, packing and selling are all a part of a single enterprise."

[21] "Congress, as well as this Court, has recognized that the packing and preparing of agricultural products for the market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces, and so long as the operation of washing, packing, and preparing for market by the employees of a farmer is on that only which he has produced on his farm, it is a necessary incident to farming and is agricultural labor. The wheat farmer must thresh his wheat; *the cane grower must cut his cane and make its juice into syrup;* the cotton grower must gin and bale his cotton; the citrus grower must pick and pack his oranges; and the tomato grower must do likewise. So long as these undertakings are in the preparation and packing by him for market of that which he has grown on his farm, the labor necessary thereto is agricultural labor." National Labor Relations Board vs. John W. Campbell, Inc., 5 Cir., 159 F.2d 184, 187 (emphasis added).

which was considered not farming by the strictest classification was covered by the enactment. We emphasize that, if it had been found that reduction of cane to raw sugar or molasses almost immediately after cutting is an imperative necessity, the palpable falsity of such sequela would have been patent. The integrated operation required making of repairs on the crushing mill while shut down for three months for that purpose, the repair and overhaul of the various machines used in cultivating, cutting and hauling, and the furnishing of power for the mill, including the hauling and burning of bagasse [22] in the furnace thereof.

In order to show how obviously it was on the wrong path, it may be observed the trial court concluded employees assisting in repair and maintenance of houses and the operation of services and facilities of villages on the plantation, where some of these agricultural workers lived, including the street sweeper and those who picked up wood for cook fires, were engaged in the preparation of goods for commerce. In this conclusion, which even the Department of Labor does not attempt to defend in its current argument, the trial court betrays emotional aversion for the semi-feudal relationships which still exist in a dependency where the perquisite system abolished by Waialua under pressure still exists.[23] The fact that some of the retainers have lived in these houses of the overlord for life or for more than forty-five years [24] is not good reason to apply the Fair Labor Standards Act, even if this Court also disapproves of the condition.

---

[22] The end residue of the cane after abstraction of the juices.

[23] The District Court describes the perquisite system at 97 F. Supp. 198, 214. By a collective bargaining agreement effective November, 1946, this system was abolished and the value of perquisites previously allowed was converted into cash wages.

[24] See the tabulation prepared by the trial court, 97 F.Supp. 198, 215.

The furnishing of housing and facilities for a purely agricultural community is local in its nature.[25] Perversion of concepts and language is essential to transmute irrigation of a growing crop, harvesting by performing processes immediately necessary for crop preservation, or furnishing essential housing to farm workers, into the production of goods for commerce. Mere rationalization will not metamorphize the practice of furnishing housing to workers so engaged into manufacturing. Such conveniences are traditionally furnished in the several states in larger operations of farms, ranches, orchards and plantations. In any event, here the furnishing of quarters for such of its workers who desired to live on the plantation on ground owned by Waialua was a convenient adjunct of farming.

We are forbidden by statute, custom and rule from making new findings of fact, even where we believe these are demanded by the record. This prohibition does not vanish where, as here, comprehensive agreements of facts are made in writing and much of the proof is documentary while the testimony does not bear on the contested issues. Writings and agreements of the parties are notoriously meretricious in dealing with jurisdictional or constitutional questions. Where some findings are clearly erroneous, our duty is to reverse.

---

[25] In a case where the employer was engaged in manufacturing, it was said, "* * * the plaintiffs were not covered by the Act while engaged exclusively in 'the construction, maintenance and repair of the residences in the mill village owned by defendant and occupied by its employees'; or, to state the matter differently, while the plaintiffs were so employed they were not engaged in the production of goods for commerce as that term has been defined." Morris vs. Beaumont Manufacturing Co., 84 F.Supp. 909, 910-911. Soomer vs. Durham, 93 F.Supp. 526, is an interesting case wherein building and repair of houses by employees of a coal mining company engaged in the production of goods for interstate commerce under the Fair Labor Standards Act is discussed.

This brings us to a consideration of a constitutional question of some magnitude. Should a statute of general application throughout all the states be given special construction in order to cure economic abuses indigenous to Hawaii? Congress has almost autocratic power over a territory. The commercial status and labor problems of Hawaii might well be settled by specific statute.[26] But the

---

[26] The thesis that the peculiar problems of a territory should not be permitted to affect construction of an act designed to protect farmers in the states is well illustrated by the progress of affairs in Puerto Rico, where the situation is even more bizarre than that in Hawaii.

Congress has approached the problem of labor in possessions pragmatically by means of extended investigations and reports. As a result of a realistic awareness of the ideochromatic characteristics of each dependency, the Sugar Act of 1937, Act, September 1, 1937, c. 898, 59 Stat. 903 ff., was enacted, which differentiated explicitly between sugar produced on the mainland and that produced in the dependencies, territories and protectorates, and that produced in the latter between the separate areas. The Court of Appeals for the First Circuit necessarily reconciled the provisions of the Fair Labor Standards Act with the clauses of the Sugar Act applicable to Puerto Rico, Vives vs. Serralles, 145 F.2d 552. Legislatively, the requirement that there be special enactments relating to Puerto Rico has been recognized by the passage of the Act of August 8, 1947, c.519, Title II, § 202, 61 Stat. 924, as amended September 1, 1951, c.379, § 1, 65 Stat. 318. The enactment by Congress of legislation amendatory of the Fair Labor Standards Act, relating particularly to Puerto Rico and the Virgin Islands, Act of October 26, 1949, c.736, § 8, 63 Stat. 915, indicates conformity to the strict letter of the former statute might unhinge the economy of these islands.

When the Act was new, the Wage and Hour Division interpreted the harvesting of the raw sugar from cane as "preparation for market" if done by a farmer. Subsequently, because of a series of decisions relating exclusively to Puerto Rico, the Administrator said the Wage and Hour Division had made a mistake in this interpretation, and that harvesting resulting in molasses and raw sugar was not excluded by the Act. This opinion was advanced with no consideration of the special conditions and legislation relating to the territory and with the intent that the construction be applied to the statute within the several states to which the special provisions of the enactments did not apply.

As noted previously (178 F.2d 603, 611), the Puerto Rican cases are generally distinguishable in that they are not related to activi-

same regulation of agriculture in the states on the mainland would be unconstitutional. In each of the two opinions of this case,[27] the trial court reviewed the whole economic structure of the Territory of Hawaii, the factor system of marketing native products, the vestiges of feudal incidents, the peculiar land system and the dependency of the islands upon the mainland. To crown all, the theory of appellees is that Congress, in passing the Fair Labor Standards Act, did not have in contemplation such an agricultural giant[28] as this farming corporation in a sea island of the Pacific, and therefore the Court refused to exclude its workers employed in agriculture. This premise is obviously based upon the idea that the language of the Act clearly excludes employees of such a corporation, but, if Congress had contemplated Waialua, the law would have placed such workers under the wages and hours provisions. But, disregarding all logical conclusions from its premise, the trial court applied the drastic overtime pro-

---

ties performed by a farmer or on a farm, but are either cooperative enterprises or are done by some outside agency. On the other hand, certain judicial interpretations, if viewed as interpretations of the general act binding on farmers on the mainland, are excrescences as foreign as gargoyles on a classic temple. McComb vs. Puerto Rico Tobacco Marketing Co-op Assn., 80 F.Supp. 953, affirmed, 1 Cir., 181 F.2d 697; McComb vs. Del Valle, 80 F.Supp. 945; McComb vs. Casa Baldrich, Inc., 80 F.Supp. 869; McComb vs. Super-A Fertilizer Works, 1 Cir., 165 F.2d 824.

[27] Found at 77 F.Supp. 480 and 97 F.Supp. 198.

[28] The Supreme Court expressly recognizes that largeness is not the test. In Addison vs. Holly Hill Fruit Products, Inc., 322 U.S. 607, 614-615, the Court adopted with approval and applied in the solution of a like problem an expression uttered in a debate in the Senate. "Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the 'work done in that plant is as described in the amendment'." The Court summarized its position as follows: "Where Congress wanted to make the exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language. Congress referred to quantity when it desired to legislate on the basis of quantity."

visions in all their rigor to the peculiar corporation which Congress had not considered.

If we were drafting a specific law to deal with labor conditions of Hawaii, emotional sympathy for some of the attitudes of the trial court might be given effect. But we are construing a general statute binding in all the states as well as this territory.

Everyone who remembers the history of this legislation knows that the mainland farmers were alert when these bills were in Congress. The Congressional Record indicates how changes in the language were required by them and that the legislators debated and explained the effect of each provision.[29] The statute which was written seems plainly to protect all possible phases of agricultural pursuits from regulation.[30] But the drive of a motivated bureau, which apparently considers the interests of labor utterly inimical to any protection of the farmer, has distorted the language used by some of the courts.

Do some opinions mean that the plain expressions of Congress in the statute excluding those employed in agricultural pursuits are to be overridden by some higher policy. The expressions of Congress were dictated not only by the pressure of the farmers, but by the realization that the federal constitution left local concerns such as agriculture wholly in the governance of the several states.

One of these perversions which might be allowable in a statute applicable to a territory alone is the attempt to

---

[29] See 81 Congressional Record 7648 et seq., 83 Congressional Record 7393, 9162-9163, 9253 et seq., H.R. No. 1452, 75th Congress, 1st Session, pp. 4-5, 11; H.R. No. 2182, 75th Congress, 3rd Session, p. 2.

[30] The agricultural exclusion "is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls." Damutz vs. William Pinchbeck, Inc., 2 Cir., 158 F.2d 882, 883.

make the farmer prove affirmatively that the particular activity falls within the statutory exclusion. The use of the word "exemption" in a heading of the enactment has been seized upon by the bureau and followed by the language of some of the courts.[31]

But agriculture is not commerce, interstate or foreign, nor does agriculture affect such commerce in a constitutional sense.[32] Most agricultural products eventually get into interstate transportation. But growing and harvesting of such products is not preparation of goods for commerce. The statute sets this out in immutable terms by expressly stating that preparation of goods for market by a farmer or on a farm is excluded.

So we must go further and direct the proceeding be dismissed for abuse of discretion in entertaining a petition for declaratory judgment here and attempting to settle

---

[31] This Court, in the former opinion, 178 F.2d 603, 609, indicated that the workers in agriculture were completely excluded from the provisions of this Act. The language of the statute makes it abundantly clear that, since agriculture is a local enterprise and cannot without distortion be called commerce or preparation of goods for commerce, the manifest intention was to exclude workers on farms and those employed in agriculture from the sweep of the Act. The use of the words "exempt" and "exemptions" in the regulations and by the courts is justified by the text. But the words of the statute, "shall not apply with respect to", indicate a policy of exclusion of such employee no matter what the business of the master. With regard to agriculture, this policy of exclusion was as powerful as the policy which dictated the general provisions controlling employees in industrial pursuits. There is no ground to invoke the theory of technical, narrow construction of the Act to cover this basic food supplying industry. Walling vs. California Conserving Co., 74 F.Supp. 182, affirmed, 9 Cir., 167 F.2d 905, cert. den., 335 U.S. 845.

[32] Federal regulation of agriculture invades the reserved rights of the states. United States vs. Butler, 297 U.S. 1, 68 But cf., Wickard vs. Filburn, 317 U.S. 111.

a question of jurisdictional and constitutional construction therein.[33]

It is true the statute was not passed with the peculiar economic situation of Hawaii in mind. Probably no specific contemplation of an organization such as Waialua was in the foreground. But no one can deny that the positive clauses of the Act were to assure the farmer in the several states of the continuance of his untrammeled way of life. It was the intention that no bureau should dictate the hours of his work[34]—traditionally from sun to sun—in the vitally essential task of feeding this nation and foreign peoples to whom aid has been extended in the form of foodstuffs. It has been a platitude of American politics that the farmer is required to pay higher prices for those things which he buys than he can obtain for the products which he raises and sells. It was in the effort to prevent the specialization of labor employed in agriculture, where every man must be able to do all of the multitudinous tasks, that these sections were adopted. It was to the end that the farmer could use in the operations on the farms unskilled and migrant labor, so that his economic burden might in one respect be lessened. These provisions of the statute were included to prevent placing innumerable restrictions and crushing burdens by bureaucratic supervision upon the American farms of the mainland.

---

[33] "This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, * * *." Asburn Hospital vs. Cass County, 326 U.S. 207, 213.

[34] Speaking of the Fair Labor Standards Act and other acts, the Court of Appeals for the Fifth Circuit states: "* * * that exemption seems to have been a part of a general legislative pattern of those times which clearly indicates that the purpose of Congress was to relieve distressed farmers from burdens which it well knew they were not equipped to carry." National Labor Relations Board vs. John W. Campbell, Inc., 5 Cir., 159 F.2d 184, 187.

There has been an attempt to use the Farmers Reservoir case as a precedent here.[35] The gist of the decision there was that release of water from a headgate by the field men of the reservoir company was not farming, (as actual application of the water to a growing crop would have been); it was not an act done by a farmer in connection with farming and it was not done on a farm. The decision on these specific grounds must be followed. Besides, there is no reason to question its logical validity on the basis above set out. It is true that the majority unfortunately accepted the acquiescence of the parties as establishing the constitutional and jurisdictional factor that the employees of a local irrigation company were engaged in a "process or occupation necessary for the production of goods for commerce." Thereby the longstanding principle of decision that a constitutional and jurisdictional issue will not be debated or considered unless actively raised by the parties was abandoned. Nor can we accept as an explanation that rationalization leads to quaint results.[36]

However that may be, in this case in a declaratory judgment proceeding in a territory, all parties and the Department of Labor acquiesce in the proposition that farming itself is production of goods for commerce. We repudiate consent of the parties as a basis for decision. Upon this fallacious theory, the trial court arrived at its findings and conclusions here accused. We hold that a farming operation such as growing the crop or harvesting is not commerce. By no dialectics can it be shown that irrigation, cultivation, plowing of the ground, pruning of the trees or any of the processes before harvest,

---

[35] **Farmer's Reservoir and Irrigation Co. vs. McComb, 337 U.S. 755.**

[36] **"Both in the employments which the Fair Labor Standards Act covers and in the exemptions which it makes, Congress has cast upon the courts the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other." Id. at 770 (concurring opinion).**

whether performed by a farmer or on a farm, are other than purely local concerns relating to the production of a crop. Common sense forbids it. Jurisdiction to regulate farming on the ground that the products thereof may eventually go into commerce cannot be conferred by consent of the parties even in a particular case. By definition, any process essential to the growing, production or harvesting of crops is neither interstate or foreign commerce nor preparation of goods therefor, nor yet again a process or occupation necessary for the production of goods for commerce. Farming in the several states cannot be regulated as commerce even if it does constitute preparation of farm products for market. To hold otherwise would violate the express exclusionary language of the agricultural clauses of the statute and the public policy of cheap production of foodstuffs above noted.

The public welfare requires that this statute be not given a local interpretation to fit the needs of any territory, and that such special interpretations be not applied to agriculture throughout the several states.[37] The language of the exclusion interprets a constitutional guarantee. It is a charter for the mainland farmer. So far as possible, in raising food for our widespread peoples, the farmer should be exempt from higher cost of labor. He should be able to plow, cultivate, irrigate, seed and harvest his crop without paying tribute. These processes, essential to all, should not be made to cost more.[38] The

---

[37] This warning was expressed in our former opinion, 178 F.2d 603, 613: "The danger is that, by agreeing to this course of conduct, a precedent might be established for the settlement of problems on the mainland which does not have the peculiar problems of Hawaii."

[38] "It does not take a long memory to recall that in the midst of the depression of 1935, and for a time before and since, the farmer was the object of the deepest solicitude by Congress. It furnished abundant evidence that it believed that no class of citizens of the country was in greater need of Congressional aid than the farmer." National Labor Relations Board vs. John W. Campbell, Inc., 5 Cir., 159 F.2d 184, 186.

farmer in California should be able to run the heads of wheat through a thresher or combined harvester and shell out the grain, clean it, test it for protein content and store it. He should be able to transport it on the farm to the thresher or to storage or market, whether by his own railroad or by trucks or by airplane. The stock raiser in Idaho should be able to use all forms of transportation carrying calves or other stock to spring pasture or feeding grounds. The stock rancher should be able to use his vaqueros to repair barns, fences, corrals and even bunkhouses, where his employees sleep, without becoming a master carpenter. The raiser of peas should be able to make repairs and changes in his tractors, viners and mowers by his own employees without becoming a master mechanic. He should be able to transport the fresh peas many leagues from his land to the canner for essential immediate processing by his trucks driven by farm hands without becoming a trucker.

The sheepman can have a worker employed by him run the system of gas or home-generated electricity which lights up innumerable farm buildings and feed the chickens he sells without becoming subject to the higher costs under the industrial provisions of this law. The orchardist of Washington should be able on his own land to pare and core the apples, transport the meat thereof to market, press out cider from the corings and peelings in a steam driven mill on his own land, and apply the residual pomace as dressing to his land without becoming a manufacturer.[39] The operations described in processing raw sugar from cane in Louisiana are in the same class.[40]

---

[39] The suggestion that this argument permits the farmer to carry on extraneous manufacturing of such articles as automobiles on a farm is vacuous.

[40] As in the case of Miller Hatcheries, Inc. vs. Boyer, 8 Cir., 131 F.2d 283, 286, "We are dealing with a situation where there has been 'a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in mo-

The authorities adverse to the maintenance of this declaratory proceeding are set out in the previous opinion.[41]

The territorial institutions of Hawaii had provided the protection for these workers almost identical with that which is the subject of this proceeding.[42] It is agreed by the parties that this Act requires Waialua to pay and it does pay as much or more than the minima of wages required per hour by the federal law. Perhaps, if local conditions compel, the territorial legislature will require the same work week in farming as is exacted by the Fair Labor Standards Act, but without federal bureaucratic control, which would necessarily be renounced if statehood were attained.[43]

Each of these employees had an adequate remedy by action at law if any thought he was aggrieved.[44] The matter could have been tried on the facts relating to his employment without the misleading background.

---

tion; of making the parts work efficiently and smoothly while they are yet untried and new'."

The Wage and Hour Division, on August 21, 1939, interpreting the Act when it was new, said:

"Section 13(a)(6) renders the wage and hour provisions of the Act *inapplicable* to employees employed in 'agriculture' * * *

"(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities among others, *when performed by a farmer*, seem to be included within the term: * * *

"4. *Sugar—Manufacturing raw sugar, cane or maple syrup and molasses.*" Interpretative Bulletin No. 14. (Emphasis added.)

[41] 178 F.2d 603, 613-614, notes 16-28.

[42] During each workweek involved herein, Waialua's employees received wages in excess of the Act's requirements. They received overtime pay for hours worked in excess of 48 hours a week. Thus defendant employees are seeking a maximum of 8 hours overtime pay for any of these workweeks.

[43] Perhaps for this reason Congress has never passed special provisions of this law applicable only to Hawaii, as it did for the Virgin Islands and Puerto Rico. See Note 26, supra.

[44] 29 U.S.C.A. § 216(b).

The cause is reversed for proceedings in accordance with this opinion.[45]

(Endorsed:) Opinion. Filed May 5, 1954.

Paul P. O'Brien, Clerk.

Judgment of United States Court of Appeals for the Ninth Circuit, dated May 5, 1954.

Appeal from the United States District Court for the District of Hawaii.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Hawaii, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed for proceedings in accordance with the opinion of this court, without costs to any party in this court.

(Endorsed) Judgment.

Filed and entered May 5, 1954.

Paul P. O'Brien, Clerk.

Opinion of United States Court of Appeals for the Ninth Circuit, dated June 24, 1954, upon Petition for Rehearing.

BEFORE: HEALY, BONE and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

The opinion of the Court needs no clarification. The cause was reversed, the final orders set aside and the cause remanded with directions to dismiss Waialua's declara-

---

[45] Arguments advanced by appellees and amicus curiae which are rendered immaterial because of the Court's decision are: (a) that the processing exemption, 29 U.S.C.A. § 207(c), applies only to the "place" in which processing is carried on and only during such time as processing is actually taking place; (b) that any employee who engages in a non-exempt activity for any portion of a workweek is covered by the Act during such workweek.

tory petition. The Court construes what is called the cross-complaint as a petition also for declaratory relief. This is left undismissed by this Court. If the appellees believe this to be a counterclaim at law, they may take further proceedings as suggested in the latest opinion of this Court. The parties and the Trial Court, however, should be mindful of the fact that this Court has held that the entire cause was tainted by apparent collusion between the parties in the attempt to obtain an advisory opinion upon constitutional questions. The considerations of expense in futile proceedings are, of course, the concern of the parties.

Rehearing denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed Jun. 24, 1954. Paul P. O'Brien, Clerk.

Order of United States Court of Appeals for the Ninth Circuit, dated June 24, 1954, denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, June 24, 1954

Before: HEALY, BONE and FEE, Circuit Judges.

ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING AND DENYING PETITION FOR REHEARING

ORDERED that the typewritten opinion this day rendered by this Court on petition for rehearing in above cause be forthwith filed by the Clerk.

Pursuant thereto and on consideration of the petition of appellant, filed June 2, 1954 and within time allowed therefor by rule of court, for a rehearing of above cause, IT IS ORDERED that said petition for rehearing be, and hereby is, denied.

Opinion of United States District Court for the District of Hawaii, dated May 3, 1951

In The United States District Court for the Territory of Hawaii

---

Civil No. 787

WAIALUA AGRICULTURAL COMPANY, LTD.,
Plaintiff and Cross-Defendants,

vs.

CIRACO MANEJA, et al.,
Defendants and Cross-Claimants.

Opinion and Decision of Court (May 3, 1951) Containing Findings of Fact and Conclusions of Law

---

METZGER, J.

Part I.

Statement and Findings

I

Nature of Action, Controversy Involved, and Jurisdiction.

This action arises under the Fair Labor Standards Act of 1938 (the Act of June 25, 1938, 52 Stat. 1060, 29 USC Sections 201, *et seq.*). Plaintiff sought a declara-

tory judgment, and the defendants filed a counter-claim under Section 16(b) of the Act to recover unpaid overtime compensation for work performed by them as employees of plaintiff, and to recover liquidated damages, costs and attorneys' fees.

Following an earlier trial herein, a decision and judgment of this court (reported at 77 F.Supp. 480), and an appeal to the United States Court of Appeals for the Ninth Circuit, this action was remanded to this court for further proceedings by a judgment of the Court of Appeals rendered November 10, 1949 (reported at 178 F.2d 603).

Following the remand, all pleadings heretofore filed in this action were amended by the parties, so as to drop certain parties defendant from the litigation, to eliminate the representative character of the case, and to limit the action to the period from November 20, 1946, to and including September 14, 1947.

Under the amended pleadings, the following issues arise with respect to that period of time:

A. Were the defendants or any of them exempt from the provisions of the Act by virtue of Sections 13(a)(6), 7(c), or 13(a)(2), during all or any workweeks falling within the aforementioned period?

B. Were certain of the defendants, while performing work of repairing and maintaining plaintiff's dwelling houses, and while furnishing related facilities and services to plaintiff's employees and others occupying such dwelling houses, engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(j) of the Act?

C. What, if any, amounts are any of the defendants entitled to recover from plaintiff pursuant to Sections 7(a) and 16(b) of the Act?

These issues are raised by (a) the amended complaint of plaintiff and defendants' answer thereto; and (b) defendants' counter-claim, cross-claim and cross-complaint under Section 16(b) of the Act, and plaintiff's reply and answer thereto. In addition, defendants seek awards of liquidated damages, and recovery of costs and attorneys fees, pursuant to Section 16(b). By its reply and answer, plaintiff seeks to defeat the request for liquidated damages, as well as overtime wages due for the period prior to May 14, 1947, by appealing to the good faith defenses contained in Sections 9, 10 and 11 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Public Law 49, c. 52, 80th Cong., 1st Sess., 61 Stat. 84, 29 USC Sections 251-263).

All issues have been presented and tried in a single trial. The evidence consists of a lengthy stipulation to certain facts, the testimony of plaintiff's office manager, the testimony of 22 of the defendant employees of plaintiff, and certain exhibits received in evidence, to which reference will be made later.

This case does not involve waiting time, clean-up time, travel time, or any of the types of activity whose consideration occasioned in part the passage of the Portal-to-Portal Act of 1947. Defendants have alleged, it is not disputed by plaintiff, and it is found by the court, that the work performed by defendants for plaintiff, for which recovery is sought in the counter-claim, was the principal work performed by them, was compensable both under an express contract and under custom and practice within the establishments and places where the defendants performed such work, and was performed during portions of the days with respect to which the same was so made compensable; that all such work was in fact paid for by plaintiff, but the dispute between the parties is whether the amounts so paid were sufficient to discharge plaintiff's obligations under the Act for overtime compensation.

This court has jurisdiction of this action and of the parties hereto pursuant to (a) Section 24 of the Judicial Code as amended, 28 USC Section 1337; (b) Section 274(d) of the Judicial Code, 28 USC Section 2201; and (c) Section 16(b) of the Fair Labor Standards Act of 1938.

Parties and Period of Time Involved.

Plaintiff is a corporation organized under the laws of the Territory of Hawaii on December 14, 1948. This action was instituted on April 9, 1947, by a predecessor corporation to the plaintiff, bearing the same name. On December 14, 1948, plaintiff acquired certain of the assets and business, and assumed certain of the liabilities, of the predecessor corporation, including all rights, interests and liabilities in, or which might arise out of, this action. By stipulation, plaintiff has been substituted as the party plaintiff in this action for the predecessor corporation. All subsequent references to "plaintiff" refer either to the predecessor corporation or to the new corporation substituted herein, depending on whether the matters to which they relate occurred prior or subsequent to December 14, 1948.

Defendants are 42 individuals who were employed by plaintiff during the period from November 20, 1946, to September 14, 1947, inclusive. Each of them appears in this proceeding on his separate behalf only, and in no way as representative of any other persons or legal entities. Unless otherwise specified, each performed his work on the plantation.

Summary of Plaintiff's Business.

Plaintiff operates a sugar plantation located in the District of Waialua, City and County of Honolulu, Island of Oahu, Territory of Hawaii. In 1945, it was the third largest producer of raw sugar in the Territory.

At the present time the plantation grows and produces sugar cane on 9,663 acres of land owned or leased by it. Substantially all of the land now devoted to sugar cane production has been owned or leased by the plantation and used by it for this purpose since 1910.

As of approximately the commencement of the period covered by this litigation, plaintiff had a total of 959 non-supervisory employees.

Plaintiff's business consists of (a) growing, cultivating, and harvesting sugar cane on the lands owned or leased by it; (b) operating a system of railroad transportation over which harvested cane is hauled to plaintiff's mill; (c) processing such cane into raw sugar and molasses at the mill; (d) shipping such raw sugar to a refinery situated in the continental United States, where such raw sugar is refined and subsequently sold under the circumstances later discussed herein; (e) shipping molasses in bulk to the continental United States; (f) operating a series of shops for the purpose of maintaining, repairing and overhauling plaintiff's buildings, machinery, equipment, vehicles, and rolling stock; (g) maintaining mill villages and housing in which plaintiff's employees and their families dwell.

Plaintiff processes no cane except that grown by itself on its plantation. Neither does it directly engage in any sugar refining operation. However, plaintiff and 30 other companies engaged in the production of raw sugar in the Territory, constitute the total membership of an association called California & Hawaiian Sugar Refining Corporation, Ltd. (C & H), a California corporation. C & H is qualified as a cooperative marketing association under the federal Capper-Volstead Act and under the applicable laws of the State of California. During the period involved in this litigation the members of C & H, including plaintiff, were under contract to deliver, and did

deliver, to C & H, all of the raw sugar produced by them in the Territory, except for inconsequential amounts sold for consumption as raw sugar in the Territory.

In this same period, C & H operated a sugar refinery at Crockett, California. Under the mentioned contract, C & H was entitled to process all raw sugar delivered to it by its members, and to sell the refined sugar resulting therefrom, as well as to sell in the form of raw sugar any quantities delivered by the members of C & H. Actually, C & H processed into refined sugar more than 90% of the raw sugar delivered to it by its members, selling the balance as raw sugar.

The proceeds received by C & H from its sale both of refined sugar and of raw sugar, as well as any by-products produced by it, were distributed in the following manner. After first deducting the operating expenses of C & H, the remainder was paid over to the members of C & H, including plaintiff, partly in the form of dividends at 6% on the shares of capital stock of C & H, all of which were owned by the aforementioned 31 Hawaii companies—"substantially in the same proportion as the tonnage of raw sugar which they ship to C & H" (Def. Ex. 2)—and the balance was paid over to the same companies, in direct proportion to the amounts of raw sugar delivered by them to C & H.

Plaintiff's Plantation Operations.

Sugar cane is highly perishable. To avoid serious losses it is processed into sugar, syrup or molasses within a relatively short time after being harvested—usually, as the record shows, the practice of processing is between 4 and 16 hours. It "cannot be stored more than 2 or 3 days without spoiling" (Def. Ex. 3B, p. 36).* It does

* For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown.

not move into interstate commerce in its natural state. Except for small amounts which are used as seed cane, it is grown for the purpose of producing sugar, syrup and molasses. It is these products, which result from the processing of cane, that become articles of interstate commerce.

Substantially all of the cane-growing land of plantation, its buildings and yard area, and other lands owned or leased by it, but unsuited for cane growing, including a wooded area from which firewood is cut for use for fuel by plantation employees living in the plantation villages, forms a contiguous and compact area. All lands devoted to the growing of cane are managed and operated by plaintiff as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment.

The growing and harvesting of cane, its processing in the mill, and the shipping of raw sugar to the refiner, take place continuously for a period of approximately 7-9 months. Annually, the harvesting and processing of cane are wholly suspended for the remaining 3-5 months, for the purpose of completely reconditioning the mill and equipment, and installing machinery and improvements.

Plaintiff's buildings, including the mill where cane is processed into raw sugar, and a number of buildings which house repair shops for the maintenance of field, transportation and mill equipment, warehouses for plantation supplies, and other buildings having functional relation to the entire plantation operations, are centrally located in the lowlands of the plantation in a compact area.

Plaintiff's cane field operations are highly mechanized. Since 1910 there has been a gradual reduction in the number of man days required to produce a ton of raw

sugar on plaintiff's plantation. This reduction was brought about through mechanization and the application of scientific methods. To a large extent hand labor and the use of horse-drawn equipment and vehicles have been eliminated, and motorized equipment substituted in their stead.

The transportation system of plaintiff is also highly mechanized, and this is likewise true of the processing operations in the mill.

There is a high degree of coordination between field operations, transportation, mill processing, shipping, and all other aspects of plaintiff's activities.

> "Operational problems on a sugar plantation are comparable to those of a Detroit factory rather than to those of a large Iowa farm. The Primary objective of the management is to maintain 'belt-line production' of sugar by so scheduling the various field throughout the plantation for harvesting and transport to the mill that full-scale raw-sugar production will be continuous, 24 hours a day. To do this it is necessary to maintain a fleet of large trucks, mechanical harvesting equipment, a system of narrow-gage railways (or other means of transporting cane to the mill), a laboratory for scientific observation to determine the water and fertilizer needs with an organized force of workers to implement these findings, and large pumping stations and gravity systems for controlling irrigation." (Def. Ex. 3B, p. 36.)

During the year 1945, plaintiff's direct operating expenses amounted to one and three-quarter million dollars. Of this sum, manufacturing costs approximated five hundred thousand dollars, and an additional sum of approximately two hundred thousand dollars was expended on transportation, in major part for main line hauling of cane into the mill. The record does not disclose the amount expended for operation of the repair and service

shops, or for maintenance of employee housing and village facilities.

It appears that plaintiff's railroad system was valued at more than three-quarters of a million dollars (Def. Ex. 2).

Activities Occurring From the Time Cane Fields Are Prepared for Planting Up to the Time of Harvesting.

In the preparation and plowing of its cane fields, a so-called "stone boat" sled is used to clear the fields of stones, rocks, and similar obstructions. Concrete irrigation flumes and pipes are moved to their proper location. Sugar cane seed is then planted. The fields are then "ratooned", this being an operation performed after a cane field is harvested to prepare it for the growing of another crop. In the cultivation, herbicides and insecticides are applied, by means of spraying equipment; in the fields, along irrigation ditches and flume areas, and along cane field roads. Weeds are removed, fertilizer is applied to the fields, and water is supplied by a network of irrigation ditches, canals, siphons, concrete pipes, flumes, water sto ige reservoirs and pumps, all of which plaintiff owns, operates and maintains. Ultimately the cane is harvested, loaded into cane cars on portable tracks in the fields, and then moved to the main line railroad.

Throughout the plantation, plaintiff maintains a network of field roads for the transportation of labor, field supplies and equipment.

Intensive irrigation throughout the year is required for the acreage devoted to cane production. Irrigation frequency is guided by soil moisture samples collected weekly from each field. Approximately 97.98% of the water received by plaintiff is utilized for irrigation of its cane fields. The degree to which water is used by plain-

tiff for irrigation purposes is shown by a tabulation received in evidence. In the year 1940, for example, plaintiff applied 30,548 million gallons; this was a daily average of 84 million gallons. By way of comparison, the city of San Francisco used 65 million gallons daily in the same year (Def. Ex. 3B, p. 43).

Plaintiff also uses substantial quantities of water to supply its mill, to operate locomotives used on plaintiff's railroad, for the domestic water needs of plantation villages and plaintiff's employees living therein, for sale to small farmers whose produce is consumed locally, and for plaintiff's system of fire protection. The amount so consumed averaged two million gallons daily.

Harvesting Operations.

To insure a balanced flow of cane to the mill, harvesting operations are coordinated with the needs and capacity of the mill, and the potential of its transportation system.

Fields ready for harvesting are first burned over, to increase efficiency in removing the cane and to reduce trash carried to the mill. In preparation for burning, fire brakes are cut through the cane by a tractor bulldozer rake. This tears cane stalks from the stools and pushes cane off to the side.

After the cane is burned, the bulldozer rake opens up lines for the laying of portable track. A portable track plow or leveler follows through these lines to make proper beds for the track. Portable track rail cars, loaded with sections of track, are drawn into the cane fields by tractors. Lifting machines hoist the track sections from the loaded cars and lay them on the track beds. Empty cane cars are then hauled from the main line of plaintiff's railroad onto a siding thereof into the field for loading purposes, and are placed into position

for loading. Cane is loaded on the cars by machines, which are cranes equipped with a boom and a finger-like grab; these pull or grab the cane loose from its growing position and load it directly into the cars. Plaintiff owns 9 such caneloading machines. Full cars are hauled out of the field to the main line for transportation to the mill. A carload of cane averages slightly less than 5 tons per car, gross cane.

Cane pieces along the portable track are later picked up by a ground crew and thrown into cars drawn by tractors. Full carts are dumped near the cane loading machines for subsequent lifting into cane cars. Cane dropped in the fields is bulldozed into piles, and these are later lifted by machine into the cars. This operation is referred to as "brooming cane". Where the main line railroad passes adjacent to the cane field, harvested cane is loaded directly into cars spotted on the main line tracks.

Main Line Transportation.

From the time of its organization plaintiff has owned and operated a narrow-gage railroad system. This system is constructed, located and operated exclusively on the plantation. It hauls no cane or freight for anyone other than the plantation. It is used predominantly to haul sugar cane from points where cane cars have been concentrated to the mill. It is also used to haul portable rails and other supplies and equipment from the plantation's warehouses and shop yards to and from the fields, but most of this type of hauling is handled by the plantation trucks. The plantation has a spur track approximately three thousand feet in length running from its mill and warehouses, and connecting with the railroad line of the Oahu Railway & Land Company. This spur track was used by the plantation to deliver box and tank cars loaded with sugar and molasses to the O. R. & L.

Company, and to receive incoming supplies delivered to the plantation by the O. R. & L. Company. The O. R. & L. Company discontinued its operations at the end of 1947. Since that time the outgoing and incoming freight of the plaintiff has been handled by an independently owned and operated trucking company.

The plaintiff's railroad network consists of 56 miles of permanent main line track, hereinafter frequently referred to as "plaintiff's main line railroad", and slightly more than 9 miles of portable track.*

The plantation railroad equipment consists of six 25-ton steam locomotives, one 17-ton steam locomotive, one 12-ton steam locomotive, one 12-ton gasoline locomotive, and one 14-ton diesel locomotive, 200 steel cane cars measuring approximately 11 feet by 6 feet by 5 feet, and 512 wooden cane cars measuring approximately 10 feet by 6 feet by 5 feet.

For the functioning of the railroad system, plaintiff maintains a roundhouse, employs section men to maintain the main line trackage, employs 10 crossing watchmen to protect the public at government road crossings, employs workers to spray the railroad rights-of-way with a herbicide, employs workers who together with field men pick up cane spilled along the railroad rights-of-way, and employs personnel to operate the trains. Six to nine train crews, with an average of seven, are required daily to handle cane and incoming and outgoing freight. A train crew consists of four men, including a locomotive engineer, a fireman, a front brakeman and a rear brake-

* Portable track laid in the field for harvesting operations lacks proper roadbed for the locomotives. The primary reason for the use of the portable track for harvesting is that permanent track cannot be laid in the field because of interference which would otherwise result in planting and cultivating operations. During the short periods when such track in the fields is in use it is an integral part of the railroad system over which cane cars move directly from the fields to the mill.

man. A cane train averages at least 60 cars, though this number sometimes goes up to 80 or even 90 cars.

Working in the roundhouse are a hostler and an engine wiper, who wash the locomotives and steam boilers, oil and grease the locomotives, fire and steam the locomotives preparatory to the day's operations, and assist in minor repairs to locomotives.

During the off-season, when cane is neither being harvested nor processed, the section men, supplemented by approximately 12 brakemen and 5 firemen, are used in repair and maintenance of main line trackage. Watchmen are used for cleaning and weeding the rights-of-way. Usually one locomotive engineer, two firemen, and three brakemen are assigned to assist the electricians on mill work primarily. One fireman and two brakemen are generally assigned to the welding shop to assist in off-season factory repairs and installation of new equipment. Two more brakemen are sometimes assigned to repair work in the boiling house. One yard engine crew, consisting of an engineer and several brakemen for the diesel locomotive, is maintained during the off-season. Locomotive engineers not otherwise used assist in locomotive repairs.

Mill Operations.

At its mill, plaintiff processes cane into raw sugar and molasses. Raw sugar is there bagged for shipment to the C & H refinery at Crockett, California. Molasses is either loaded for shipment to the continental United States, or stored temporarily in molasses tanks. Bagged sugar and molasses were loaded into railroad box and tank cars of the Oahu Railroad & Land Company, a carrier, which then proceeded with the transportation of these commodities to points of shipment for the mainland.

The term "mill" means the building and equipment of plaintiff used in the actual processing of sugar cane into raw sugar. This includes a cane-cleaning plant and

scales, mill carrier, crushing plant, boiling house, fire-room, power plant, sugar warehouse, molasses tank, and all equipment located therein.

Mill operations commence when loaded cane cars are delivered by locomotive on the plaintiff's main railroad, to the mill yard and moved up to the mill. Here the cane is weighed, unloaded, washed, and as much trash is removed as is mechanically possible. These operations take place in the cane-cleaning plant.

After being cleaned, the cane is moved by mill carrier to the crushing plant, is there crushed, and the juices extracted. Sugar juices are then clarified and crystallized in the boiling house. The chief product, which is raw sugar, is then bagged and shipped, or temporarily stored and later shipped.* Molasses is pumped into a storage tank at the mill, and later shipped.

The cane fiber which remains after the extraction of the juice from the cane stalk is known as bagasse. It serves as an economical source of fuel for the production of power. Bagasse produced at this plantation has no marketable value, but is burned in the fire-room, located in the mill, and produces steam. This in turn is used to drive the mill engines and cane processing equipment, to heat and evaporate sugar juice and crystallize the raw sugar, and to generate electric power at the mill's power plant. Steam used for the latter purpose, after passing through generating machinery, is conveyed through lines for further use in processing operations.

The power plant generates electric power. This, however, supplies only about two thirds of the power needed by plaintiff, so it purchases one third of the power used

* The plaintiff's temporary storage of raw sugar is never motivated by economic considerations, but is due only to the limited number of cars and limited storage space at the port wharves and occasional interruptions in ship schedules.

by it from the Hawaiian Electric Company, Ltd., an independently owned and operated public utility.

There are times when plaintiff's power system generates more power than it has need of. Because of an existing tie-in between its power system and that of Hawaiian Electric Company, on rare occasions plaintiff feeds back power into the system of Hawaiian Electric. Credit for such power is given to plaintiff in the same manner as though a sale had occurred.*

Power generated by plaintiff, as well as that purchased by it, is distributed by transmission lines to all the various operations on the plantation, and also to several non-plantation users living in the plantation community. The total amount of power used by non-plantation users is about one-half of one per cent of all the power distributed by plaintiff. None of it is used for or in connection with the production of goods for commerce, or to operate any instrumentalities of interstate commerce, or transmitted into interstate commerce.

In the off-season, when the steam and electric power equipment in the mill are overhauled, plaintiff generates no electric power, purchasing all the power it needs from the Hawaiian Electric Company.

Weekend Shutdown In the Mill

Production in the mill operations is keyed basically to a 6 day week with continuous and around-the-clock operations divided into three 8-hour shifts. The mill stops grinding cane at 2 p.m. Saturday and starts up at the same time on Sunday. The cessation of grinding operations on Saturday does not, however, result in the stopping of all mill operations. As shown later, in the descrip-

* Power is not fed back to the Hawaiian Electric lines for the purpose of selling power but only because it is a necessary, convenient and economical method of disposing of the excess power.

tions of work performed by various defendants, the week-end shutdown period does not extend for 24 hours in regard to the boiling house, the fireroom, and the operations of the power plant.

The weekly shutdown for mill operations is necessary to perform cleaning and minor repair work.

Off-Season

Although sugar cane can be and is grown the year round in the Territory of Hawaii, efficiency of operations dictates the closing down annually of sugar mills so that extensive general repairs, reconditioning, and installation of improvements can be had. That part of the year when the mill is shut down for repairs is termed the "off-season". While the off-season usually lasts 3-5 months, in the period covered by this litigation it extended only from December 22, 1946, to and including February 9, 1947.

During the off-season, plaintiff conducts no harvesting, cane transportation, or cane processing operations. Field operations continue.

Most of the off-season repair work in the mill is done by employees who, during the grinding season, operate the mill machinery. However, some of this repair work is done by employees of the machine shop, welding shop, blacksmith shop, carpenter shop, and electric shop.

Just as many man-days of work are performed during each 24 hour period in the mill during the off-season as during the grinding season.

Repair and Service Shops

Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and major overhaul.

Plaintiff operates and maintains a number of repair and service shops which are physically distinct from the mill, housed in separate buildings, and located in an area extending up to 300 feet from the mill building. These shops employ upwards of 100 men, plus necessary foremen and supervisors. These shops are: machine shop, welding shop, blacksmith shop, tinsmith shop, caneloading machine repair shop, tractor repair shop, garage, electric shop, carpenter shop, paint shop, plumbing shop, and roundhouse.

1. *Machine Shop*

The machine shop is staffed by 8 employees working under supervision of a machine shop foreman. Practically all of plaintiff's machining work, except heavy work required by the mill, railroad and shops, is done in the machine shop. The grinding of crankshafts for cars, trucks, tractors, and cranes, the machining of emergency parts for such equipment, and machine work on irrigation pumps are performed in this shop. Major locomotive repairs are made by machine shop personnel working with a heavy crane in the welding shop.

Approximately 46% of all machine shop work is for the mill, and 50% for other service departments, including repairs to steam engine driven irrigation pumps. During the off-season, mill work done by the machine shop accounts for from 85% to 90% of the total man hours' work performed.

Work in the machine shop is fairly uniform throughout the year, with peaks in cases of emergency mill repairs and during the mill off-season. Locomotive overhaul is carried out to a limited extent during the grinding season to relieve machine shop off-season work. Steam engine driven water pumps are scheduled for overhaul after the mill overhaul has been completed and after grinding operations are resumed.

A large portion of the work done by the machine shop personnel is performed within the shop, utilizing shop tools. These tools include lathes, hydraulic press, drill press, planer, boring machine and crankshaft grinder. From time to time machine shop personnel are called into the mill to perform repairs, regrooving of mill rolls, and such other work as cannot be expeditiously handled by mill workers.

2. *Welding Shop.*

This shop employs 5 men under supervision of a welding shop foreman. About 46% of its work is for the mill. In the off-season, welding shop work for the mill represents approximately 90% or more of the total man-hours. Most of the welding repairs to mill equipment are made in the shop, although personnel are sometimes dispatched to the point of breakdown.

Steel cane car repairs are made alongside the shop building by the shop personnel. Welding Shop employees also operate pipe rolls located in the pipe rolling shed. The pipe which is rolled is generally irrigation pipe 18 inches in diameter or larger. Welding of this pipe is performed by the shop welders. In this work the welding shop employees are assisted by employees from the blacksmith shop or caneloading machine repair shop.

Welding shop equipment consists of heavy pipe rolls, several sets of acetylene and cutting outfits, acetylene generators, and both stationary and portable welding generators.

3. *Blacksmith Shop.*

This shop employs 2 blacksmiths and 2 helpers under supervision of the caneloading machine repair shop foreman. About two days each week are spent by the blacksmiths and helpers on mill work, consisting principally

of constructing and reconditioning of cane carrier leveling and preparation knives. Cane car repair work, such as straightening of bars and channels, and repair of tractors and caneloaders, and field implement work, occupy the great percentage of the man-hours in the shop. The work of this shop is uniform throughout the year. Equipment in this shop includes 2 forges, an electrically operated hammer, and a variety of small tools.

4. *Tinsmith Shop.*

This shop employs a tinsmith journeyman and 2 helpers. Mill repair work here is negligible, although light sheet steel work, including maintenance and repair of roof gutters and down pipes, is performed by the shop personnel. Repairs of auto, truck, tractor and caneloader radiators are performed by the shop personnel.

The main work of this shop is the making and reconditioning of tin irrigation scoops. These scoops are used in quantity in the field for the purpose of deflecting water from concrete irrigation flumes to field irrigation lines.

5. *Caneloading Machine Repair Shop.*

Twelve employees and a foreman work here. They perform all major repairs and overhaul of caneloaders, grabs and miscellaneous field equipment. Men from this shop are occasionally called upon to assist in emergency mill repairs. They also go into the field to repair caneloading machines during the course of harvesting operations.

An important function of this shop is the construction of auxiliary field equipment, such as sub-soilers used in plowing, cane line reshapers used to maintain irrigation water lines in the field, and portable track line leveler attachments used in leveling the lines for laying portable tracks. Repairs on such auxiliary field equipment are

also made in this shop, with assistance from personnel of the tractor repair shop.

In the off-season, at least 8 of the 9 caneloading machines are completely dismantled and reconditioned. The 9th machine is reconditioned after harvesting has been resumed. In the off-season, 10 to 12 operators of caneloading machines are brought in to supplement the regular employees of this shop, and to assist in overhaul. Five cane grabs are overhauled and reconditioned during the off-season, and all other cane grabs are repaired. During the harvesting season, 3 new cane grabs are usually built.

Equipment in this shop includes 4 portable welding generators, and 3 portable welding generators mounted on trucks for field repairs. A hydraulic press, overhead crane, motor-driven grinders and a variety of small tools complete the shop equipment. Four welders in the shop take care of welding repairs in the field, and repairs to, and building of, new field equipment.

6. *Tractor Repair Shop.*

Seven employees normally work here, but in the off-season this number is supplemented by 12 to 15 tractor operators who are brought into the shop from the fields, to assist in repairs. All tractors used in the harvesting field are overhauled in this shop during the off-season. Tractors used for towing cane line reshapers are also overhauled during the off-season. Other tractors which cannot be overhauled during the off-season are scheduled for overhaul at a later date. This may mean that 6 or 7 out of a total of 48 tractors are left for operating season overhaul. Tractor engines are overhauled at regular periods.

Employees of this shop are sometimes dispatched for repair of tractors in the fields. They also assist in repair

of field implements in the caneloading machine repair shop.

7. *Garage.*

Personnel employed here numbers 24. Primarily work of the garage is to maintain and keep in repair plaintiff's 98 motor vehicles, consisting of 18 passenger vehicles, 48 pick-up trucks up to one ton, 27 heavy trucks from 1½ to 7 tons, 1 motorcycle, 2 fire trucks, and 2 panel trucks. Sixty-four of these vehicles are assigned to operations in the field, 12 to the repair and service shops, 1 to the mill, 1 to the hospital, 2 to the plaintiff's retail store, 7 for administration, 2 are fire trucks, and 9 to the motor pool.

Overhaul of cars and trucks is scheduled throughout the year, except that pick-up trucks used by the harvesting men are overhauled during the off-season. Truck drivers are not used to assist in truck or auto repairs, since there is generally a spare truck to drive when others are being repaired. All such work is performed by the garage mechanics.

Shop equipment consists of 4 overhead cranes, a hoist, valve grinding machine, brake drum lathe, boring machine, tire tools, and a variety of special tools.

Complete servicing equipment is also maintained, together with necessary personnel. Seven full-time employees and one part-time employee perform the lubricating and washing of vehicles. One employee dispenses gas and oil at the yard service station. Six persons are employed as helpers to garage mechanics when there is no service work.

Field service covers the daily lubrication of all equipment and the replenishing of fuel tanks. Tractors, caneloading machines, portable air compressor, diesel and

gasoline locomotives, and all field equipment are serviced daily by a total of 6 men. Two completely equipped service trucks manned by 2 men each service all field equipment, except that in the harvesting fields. In the latter case, a two-wheel trailer, tractor-drawn, is kept in each of the two harvesting fields. Oil, gasoline, diesel oil, greases and water are carried on the trailer together with power-operated grease guns. One man assigned to each trailer services the cranes and tractors in the harvesting fields. In this way service work can be done during lunch hour and slack periods without serious interference with harvesting operations.

8. *Electric Shop.*

Fifteen employees work in this shop. Three of these are mill electricians who divide their time between the mill and the shop, working two weeks in the former, then one week in the latter. The shop maintains electric pumps and transmission lines and performs domestic wiring repairs, including wiring of houses, and the building of new electrical appliances. Employees of this shop perform necessary work on electrical machines located in the other shops.

In addition to mill repair work done by the employees assigned as electricians to the mill, electric shop personnel may assist them in case of major electrical repairs required. About half of the work in this shop is for the mill. During the off-season, about 70% of the work is for the mill.

9. *Carpenter Shop.*

Twenty-five carpenters and two supervisors comprise this shop's personnel. They perform all carpenter work on the plantation, which includes construction of mill scaffoldings, construction and maintenance of railroad

trestles and wooden gates for flumes, and construction and maintenance of cane cars. In addition, they perform necessary maintenance work on the plantation buildings and houses. They also install and maintain steel and concrete pipe lines and siphons. Miscellaneous construction, such as construction of tool lockers, scrapers and strainers, is performed in this shop. Field work, including work on the flumes, railroad trestles, siphons and pipe lines, accounts for about 25% of the work of the employees. Mill scaffoldings and mill building repairs, construction of tool lockers, scrapers and strainers, account for another 10%. Maintenance and repair of plaintiff's buildings and housing account for another 45%. The remaining 20% of the work consists of construction and repair of cane cars. The work is uniform throughout the year, with little change between grinding season and off-season. During the off-season, additional men averaging from 10 to 15 may be brought in from the fields to assist in cane car overhauling and general carpentry work.

10. *Paint Shop.*

Here are employed 5 painters and a supervisor. They perform all painting work on plaintiff's buildings, including housing, and they also occasionally paint siphons and railroad trestles. As a general rule, they do not paint for the mill, this work being done by mill employees. Most of the time of the paint shop crew is devoted to painting of plantation buildings and housing throughout the year. During the off-season, an average of two additional employees brought in from the fields may assist in the work of this shop.

11. *Plumbing Shop.*

Six plumbers and one supervisor work here. They perform all plumbing work on the plantation, including the construction and maintenance of sewer and water

systems and plumbing for buildings and housing. Approximately 10% of the time is devoted to mill plumbing work, 15% to field work and the remainder to buildings and housing. Assignments vary little throughout the year. During the off-season, an average of two field employees may be assigned to the plumbing shop as helpers.

12. *Roundhouse.*

Reference to the roundhouse has already been made. It regularly employs two men in the shop, who perform the servicing, cleaning and firing of plaintiff's locomotives. Additional employees are occasionally assigned to this shop to assist in minor locomotive repairs.

Laboratory.

In a separate building, plaintiff operates a laboratory. Various chemical tests are made by the laboratory personnel in the course of all field and mill operations. This work is performed under the supervision of a chief chemist with the assistance of 13 chemists, testers and samplers. By performing careful analysis of various kinds relative to the cane and materials in the course of growing, cultivating and harvesting of cane, and the extraction of the sugar juices, all operations are controlled pursuant to scientific methods.

Determinations of the cane fiber in each field, or variety of cane, are made during each shift. Figures obtained are used in calculating bagasse weights, field distribution and extraction percentages.

Cane leaf analysis is made from samples of cane tops brought in each day and analyzed for green weight mixture, total sugars, nitrogen, potash and phosphate.

Daily tests are made for a variety of other purposes. Tests are made to determine the amount of field trash in

harvesting brought to the mill. Continuous samples are taken from the feed roller of the first mill each hour, and also at each change of harvesting, and records of ratios of cane to available sugar are obtained. Extracted juices are sampled to determine the sugar obtained from cane by the milling process. Extracted juices are used to calculate the weight of bagasse. Every three hours samples from clarified juice are taken, to reveal the relative amount of solids being removed by the lime and heat treatment of juices. Purity of syrup is checked. Samples of bagasse are taken every two hours, and ash determinations are also made twice daily, to determine the influence of different fields on the fireroom. Mixtures of sugar and molasses are tested to determine the amount of sugar lost in the filter cake.

Tests are also made of the mill boiler water, locomotive boiler water, steam pump boiler water, and pump water. Pump water from electric pumps and well water are sampled once each month. Wash water from the cleaning plant and condenser water are also analyzed each shift.

Concrete Products Plant

In a separate building, plaintiff operates its own concrete products plant. Six men ordinarily staff it, although the number varies from 4 to 10. Work is usually performed on a single shift basis, but occasionally two shifts are maintained.

This plant is engaged primarily in producing concrete irrigation flumes and water supply pipe. It also makes blocks, footings, sidewalk slabs and various other incidental concrete products required by the plantation. Crushed rock used in the manufacturing process is purchased locally, but from 80% to 90% of all cement used is obtained from the continental United States. The work

consists of setting up forms, mixing and pouring concrete, removing the previous day's products and arranging them in storage. Cement used is stored in cars which are set on the siding near the plant, or the cement is stored in the cement shed as part of the inventory of general supplies warehousing. In the latter case, unloading of cement is done by the warehouse personnel. Various activities requiring the flumes, pipe and other products receive them direct from the storage area where the products are stored.

The operations do not have any off-season. During the off-season, however, additional personnel may be brought in from the fields. In 1946, the plant produced approximately 46,000 concrete pieces, including flume sections, pipe and other products.

Storage of Supplies

Materials and supplies purchased for plantation operations are warehoused or stored in several separate buildings located in the plantation buildings and yard area. Value of supplies on hand averages $500,000. The total value of goods procured during a year, including stock and special order materials, averages over $1,000,000.

Most of the materials received were shipped to the plantation from Honolulu on the O. R. & L. Purchases may be either local or by order and direct shipment from continental United States. Freight received is placed in the proper warehouses by the warehousing personnel. In almost all cases railroad sidings permitted placement of the O. R. & L. cars next to the warehouse receiving the materials. The warehousing personnel is not responsible for, nor does it engage in, delivering materials to the various operations or shops.

The principal buildings in which the supplies and materials of the plantation are stored are the general sup-

plies warehouse and the heavy supplies warehouse. They house electrical goods, building hardware, paints, window screening, tractor and caneloading repair parts, copper tubing, pipe stock, metal shapes stock, galvanized sheeting, steel sheets and many other items.

The oil storage warehouse contains lubricants and a limited amount of paint.

Gasoline, fuel oil, diesel oil and kerosene were discharged directly from the O. R. & L. tank cars into storage tanks.

Most of the automotive parts and tractor, caneloading and miscellaneous parts are stored in the garage.

Cement is stored in a separate warehouse. Lime is stored in the mill in the lime room after being unloaded by warehousemen.

Lumber is stored in the open lumber yard adjoining the general supplies warehouse. Herbicides are also stored there.

Fertilizers are usually trucked directly from railroad cars to the field as needed; but if temporary storage is required, they are placed in the sugar warehouse.

The warehousing operations are handled as one unit under a warehouse superintendent with 13 employees. Five clerks perform the bookkeeping and handle accounts. The remainder of the warehouse personnel is employed in the unloading and storing of stocks and materials, keeping stock record cards and taking inventory.

Main Administration Office.

The main administration office is located about 1500 feet from plaintiff's buildings and yard area. The manager, assistant manager, and staff assistants have their offices here. Employees include the cashier, bookkeeper,

head timekeeper, 6 assistant timekeepers, 8 clerks, 5 stenographers and typists—a total of 22 employees working under the office manager and his assistant. Four timekeepers keep the time of the field employees; 2 keep the time of the shop, store, mill, hospital and village maintenance employees. These offices are where payroll records are maintained, and salaries and services paid.

Also housed in this building are the offices of the civil engineer, one assistant surveyor, 2 junior surveyors, and 2 rodmen, who work alternately in the field and in the office. There is also a draftsman employed in this office. The agriculturist and industrial relations sections are also located in the same building.

Stables.

The plantation has one main stable near the plantation buildings and yard area. It uses 38 horses and mules. Horses are used by the harvesting overseer to ride in the fields. Pack mules are used upon occasion to pack seed, fertilizer, broken concrete flumes and other things in and out of the cane fields. The plantation has several feeding stations for horses and mules where they are kept temporarily while work is being performed in a particular area. Three employees are assigned to the work of the stables.

Firewood.

Plaintiff maintains a splitting station in the mill yard. This is equipped with saw and splitting machinery generated by electric power. Firewood, cut by plaintiff's employees at various places on the plantation, is brought to the station to be sawed and split into pieces of appropriate sizes. The uses of such firewood are: sale of firewood to employees and pensioners, for cooking and heating purposes; for heating water at the village bathhouses;

and for starting small boilers and heating walls within the furnaces and pumps used to supply water for irrigating cane fields and for domestic and other uses in plantation villages.

Macadamia Nut Trees.

Macadamia nut groves are operated by plaintiff in an area approximating 121 acres. Such area is not suitable for sugar cane. During the period covered by this litigation, the trees had not yet reached maturity and no nuts were harvested. A nursery for cultivation of young macadamia trees is maintained on the plantation.

Plantation Villages.

At the time plaintiff was originally organized, there was no established community housing, or other facilities, in or near the area which plaintiff proposed to devote to the production and processing of cane. To establish a stable labor supply and house it at places convenient to plaintiff's purpose, plaintiff undertook to create a community, and to supply housing and other necessary services and facilities for its employees. Plaintiff constructed houses, developed services, and built up and established various facilities to serve the needs of permanent living, in plantation villages, of its required number of employees and their families. This was done over a period of years, resulting in the development of Waialua village and several small villages.

Waialua village has all the physical and visual characteristics of an established community and is similar to a typical small town of a farming community center. The area is crisscrossed with government roads and roads constructed and maintained by plaintiff. The community offers the usual services and typical commercial establishments to be found in any small town. There is a

company store, or retail store, with two branches; an automobile service station; and a hospital. These are owned and operated by plaintiff for plantation employees and their families and non-plantation persons. Plaintiff also built in this area two gymnasiums, one clubhouse, one athletic field, one beachhouse, one swimming pool, and two tennis courts, which are available to an athletic association, membership of which is composed both of plaintiff's employees and others in the community.

Additional services and establishments located in the community, which are independently operated, include ten general stores, two restaurants, two fish markets, one candy store, one hardware store, one clothing store, four barber shops, one beauty shop, one photographic studio, two automotive service stations, two motion picture theaters, and one bank.

> "It must be remembered that the whole plantation area, including the town, is owned by the plantation company, and although there are frequently many shops, such as drug stores, tailor shops, shoemaker shops and the like, that are privately operated, they rent their sites from the plantation and can remain only as long as the plantation permits them to do so. Anyone on any part of the plantation is a trespasser unless he has the permission of the management to be there. * * *" (Def. Ex. 3A, p. 71.)

Also located in the village are a post office, public library, five churches, one intermediate school, one high school, and one day-care center operated by the territorial school system.

For many years, plaintiff's employees occupied plaintiff's dwellings pursuant to a system of perquisites. Under this system, employees received housing, housing maintenance, water, firewood and kerosene fuel, electricity, medical care, recreational facilities and various maintenance services, including garbage disposal and street clean-

ing, as a part of their regular compensation as employees of plaintiff. This system was abolished by an agreement dated November 19, 1946, between plaintiff and the International Longshoremen's and Warehousemen's Union, Local No. 145-7, which acted as collective bargaining representative for most of plaintiff's non-supervisory employees. As part of the change thus inaugurated, the value of the perquisites previously allowed to employees was converted, at scheduled rates, into cash wages to be paid by plaintiff by way of wage increase, and thenceforth the employees commenced to pay cash, at scheduled rates, as non-employees do, for the continued furnishing by plaintiff of the aforementioned facilities and services, except that no charge, either to employees or others, was designated for garbage collection, sewage disposal, fire protection, maintenance and cleaning of village roads and similar village services, which continued to be provided by plaintiff. Neither was any charge designated for continued use of parks, playgrounds, plaintiff's clubhouse and gymnasium and recreational facilities generally.

An undisclosed number of plaintiff's dwelling houses are not equipped with tub or shower facilities. For the inhabitants thereof, plaintiff maintains bathhouses. From November 20, 1946, when perquisites were terminated, until April 30, 1947, no charge was made for use of the bathhouse, except as this was included in the rent paid by employees for the dwelling houses. Commencing May 1, 1947, and throughout the balance of the period covered by this litigation, plaintiff instituted a system of charges for use of the bathhouses: 50¢ per family per month, and 25¢ per month in the case of a single man without dependents.

At the present time, the dwelling houses owned by plaintiff number 820, all located on the plantation. Most of them surround the buildings and yard area located

near the mill. These houses, together with the business establishments of the community, constitute the village of Waialua. There are 335 houses which are scattered over the plantation, but these too are located in clusters and form small villages.

No employee covered by the existing collective bargaining agreement, including each employee defendant herein, is required as a condition of employment to live on the plantation or in plantation houses or to use any service or facility that the plantation may be in a position to render its employees. The relationship that exists between the plantation and its employees who live in plantation houses is that of landlord and tenant. However, of the total number of 959 non-supervisory employees of plaintiff, only 16 live off the plantation in houses not supplied or owned by plaintiff. The remaining employees and pensioners, together with their families, an aggregate of 2952 persons, all inhabit dwellings owned by plaintiff and generally located in Waialua village, or one of the other plantation villages owned by plaintiff. Plaintiff also rents to non-employees, totaling 421, dwellings not occupied by employees of plaintiff. Some of these persons work off the plantation altogether; others are persons who own, operate or are employed in the independently controlled businesses located in plaintiff's plantation villages.

The relationship between an individual's employment with plaintiff, and his occupation of a company-owned house, is shown, as testified to by 22 of the defendants, in the following tabulation:

Defendant	*How long employed by plaintiff*	*How long has lived in house owned by plaintiff*
Claunan	20 years	20 years
Crisostomo	26 years	26 years
Cumlat	Over 10 years	20 years
Faria	40 years	44 years; bought own home in June, 1950
Fujiwara	12 years	Lives with her family, which has occupied company-owned house for over 30 years.
Hayashi	Over 15 years	25 years
Holmberg	23 years	(Not testified to)
Izawa	22 years	36 years
Kobota	23 years	23 years
Koshiwabara	26 years	26 years
Lorenzo	14 years	14 years
Maneja	23 years	23 years
Mori	16 years	34 years
Oato	14 years	30 years
Pacheco	7½ years	27 years
Reyher	25 years	29 years
Robello (S)	28 years	45 years
Sunihara	20 years	26 years
Takata	20 years	39 years
Tanaka	11 years	All his life; was born in company-owned house
Watanabe	17 years	5 years
Yamada	24 years	All his life; was born in company-owned house; father was employee of plaintiff.

Plaintiff has established a fire protection system at the village of Waialua, and as part of that system operates two fire trucks. It also maintains fire hydrants in and about the village, the mill, various buildings in the yard area, and at various other locations.

There is a cemetery, located on plaintiff's property, for its employees and their families.

Prior to the abolition of the perquisite system, employees of plaintiff performed the work of maintaining and keeping in proper repair the dwelling houses owned by plaintiff, and the village area, and in supplying the usual services necessary to the operations of a community.

This has continued without change. Under the mentioned collective bargaining agreement, plaintiff expressly undertakes to provide dwelling maintenance and repairs, and village services; and in this connection, not "to make housing a profit-making venture, as such."

Organization of Plaintiff's Plantation.

At all times involved herein, plaintiff has been a member of the Hawaiian Sugar Planters' Association (HSPA), an organization of Hawaiian sugar-producing plantations. The association publishes a manual, portions of which were received in evidence as Defendants' Exhibit 2. Major enterprises of the association, as set forth in this manual, are quoted in a publication of the United States Department of Labor, entitled "The Economy of Hawaii in 1947", Bulletin No. 926, prepared and transmitted to the Congress of the United States pursuant to a requirement contained in the Organic Law of the Territory of Hawaii, 1900, as amended April 3, 1904, 33 Stat. 164. A copy of the publication was received in evidence as Defendants' Exhibit 3B. An earlier report of the Department of Labor, also rendered pursuant to the provisions of the Organic Law of the Territory, was published under the title, "Labor in the Territory of Hawaii—1939", Bulletin No. 687, House Document 848, 76th Cong., 3rd Sess. A copy of this report was received in evidence as Defendants' Exhibit 3A.

As described in the manual issued by HSPA, its functions are these:

> "The Hawaiian Sugar Planters' Association is an organization of plantations and individuals united for the purpose of cooperative improvement of the island sugar industry as a whole . . . The association's major enterprises are divided into the following departments: Experiment station, bureau of labor and statistics, labor saving devices committee, boiler in-

> spection committee, public relations committee, labor relations committee, legislative committee.
> "The association acts as a clearinghouse for all activities of the industry, making possible the freest and quickest interchange of information among the plantation executives. It maintains an office in Washington, D. C., which handles all relations of the Hawaiian sugar industry with Government departments and the Congress." (Def. Ex. 3B, pp. 34-35.)

This statement of the functions of HSPA is supplemented as follows:

> "The plantations are organized in an association which has planned for the Hawaiian sugar industries as a whole and which has developed the whole framework of economic relations necessary to their existence on an industry-wide basis, including shipping, the purchase of fertilizer, equipment and other supplies, the development of mainland refineries and markets, the supervision of management labor policies, the maintenance of research laboratories and the formulation of common programs of action for combating plant diseases, insect pests, and soil problems." (Def. Ex. 3B, p. 33.)

A further aspect of plaintiff's organization is found in its relationship to Castle & Cooke, Ltd., an agency or factor with which it is connected (Def. Ex. 2). Concerning the relationship that exists between plantation and factor, the HSPA manual declares as follows:

> "While each of the 36 plantations in the Hawaiian Islands is a corporate entity, all their affairs, except the actual operation of sugar growing, are centralized in what are known as factors, general agents offering a multitude of services to their clients. There are five principal factors: Alexander & Baldwin, Ltd., American Factors, Ltd., C. Brewer Co., Ltd., Castle & Cooke, Ltd., T. H. Davies & Co., Ltd." (Def. Ex. 3B, p. 35.)

The functions of the factors are summarized as follows in the HSPA manual:

> "Financial.—All fiscal matters of the plantations are handled by specialists in the offices of the factors. Moneys are received and disbursed, tax statements prepared, water and land rents paid or received, surpluses invested, or deficits advanced.
> "Experimental.—Engineers and other technicians are constantly seeking ways to improve the output of the various client plantations.
> "Shipping.—All the multitudinous detail of shipping huge quantities of sugar by water to the mainland is in the hands of the factors.
> "Merchandising.—Through their mainland buyers, the factors provide a steady flow of needed merchandise to plantation stores and to the plantations themselves. Because of the size of their operation, everything a plantation and its personnel need is provided at a minimum cost." (Def. Ex. 2)

The significance of the factor system is stated as follows:

> "The long-run result of the agency system was thus to deprive the plantations of their independence and to transfer control to the factors, a control which has been further unified by the coordination of policies and planning in the central offices of the Hawaiian Sugar Planters' Association." (Def. Ex. 3B, p. 35).

These developments, as well as many other aspects of plaintiff's operations, would seem to be unique to the Territory of Hawaii.

> "In the sugar-producing areas of Louisiana, Puerto Rico, and Philippines, and the sugar beet States, a farming system had been established before the development of the sugar industry. As the farmers in those areas already owned the land, sugar production grew along the lines of the established farming system.

> "The Hawaiian sugar industry, on the contrary, began on land which was undeveloped. * * * The land tenure system in Hawaii is different from that in any other part of the United States. It is a complex outgrowth of the feudal system which existed before annexation, under native Hawaiian royalty." (Def. Ex. 3B, pp. 32-33.)

The typical Hawaiian sugar plantation has been described as a "small world in itself" (Def. Ex. 3A, p. 70), whose "structural organization and functioning * * * is not unlike that of an army, with its clear cut lines of authority and its careful program for attaining given objectives" (Def. Ex. 3A, p. 14).

In immediate charge of plaintiff's plantation is its plantation manager, who is shown in a chart appearing under the designation "Plantation Organizations" in the published manual of HSPA (Def. Ex. 2), to have over-all control of all plaintiff's operations on the plantation, including conduct of plaintiff's villages. The designation of the manager, and the authority exercised by him, have been described as follows:

> "The manager of the plantation is appointed by the controlling 'factor' or agency. He has wide authority over the plantation and the mill and exercises a considerable influence over all community activities. * * *
>
> "The plantation manager was the chief official and central authority on all aspects of plantation life. In addition to his technical knowledge regarding sugar production, he had final responsibility in the direction and operation of sewerage and water system, of the fire-protection systems, police force, the railroads, and performed many of the functions that a mayor would perform. He even sat as an informal judge on cases involving minor disturbances and petty larcenies." (Def. Ex. 3B, pp. 36, 39).

Departmentalization of Plaintiff's Operations.

Plaintiff maintains an elaborate system of keeping detailed records of all its costs and expenditures. All pumps, locomotives, trucks, tractors, machines and implements of machinery are given identification number, and a record is made of the hours of work performed in their maintenance, repair, and utilization. For each employee a daily timesheet is kept showing in detail what his work consisted of, and to which operation or piece of equipment it pertained. This information is transferred to a weekly time record, which also carries data concerning the employee's rate of pay for the jobs performed by him and his total compensation for the week. By use of a further series of numbers, plaintiff records whether a given piece of work represents a capital improvement or a running expense charge.

It appears from the testimony of plaintiff's office manager (Tr. 43-53) that its practice for nearly 20 years has been to keep separately identifiable sets of employee records for its several departments. The main departments were described by him as follows:

1. Service Department, which includes the railroad and truck operations, and the various shops: ". . . such as the track shop (section repair shop), the P & H shop (caneloading machine repair), the welding shop, machine shop, paint shop, electric shop * * *".

2. Factory Department, which covers employees of the mill, commencing with "the employee who, when the cane car comes alongside the mill, weighs it and participates in the job of releasing the cane from the car into the container, the conveyor," and ends with the loading of sugar into freight cars or the warehouse adjacent to the mill.

3. Warehouse Department.

4. Field Department, which embraces "preparing for plowing, plowing, planting, ratooning, cultivating, irrigating, fertilizing, * * * up to the time that the cane was put on the main line of the plantation to take to the mill * * * in other words, where the permanent transportation line took over."

5. Village Facilities Department, covering painters, plumbers, carpenters, and others who repaired, maintained and serviced plaintiff's villages, and the dwellings located therein and occupied by plaintiff's employees.

In addition to these main departments, there are a number of others, also separately maintained. These were identified as the office department, laboratory, civil engineering, hospital, truck department, and agricultural control and research.

The foregoing lengthy statement of the extent, nature, and methods of operation of this large agricultural industrial enterprise is culled from testimony and largely from a detailing written stipulation between the parties of 771 pages, to which is attached a printed contract between the company and ILWU Local 145, Unit 7, together with numerous maps, charts, and tabulations, all of which is a material part of this trial.

This corporate enterprise was organized over a half century ago and has shown continuing expansion and development. With the exception of a few years, it has been quite profitable to its agents and shareholders.

Part II

Commerce Coverage.

The activities of plaintiff described above constitute the operation of an industry which is engaged in commerce and in the production of goods for commerce. In-

cluded in these activities are a number of separate and distinct enterprises appropriate to the production of sugar and molasses under the many and unique circumstances out of which plaintiff's operations have developed and taken form. In the conduct of these enterprises, plaintiff has assumed a variety of functions including those of farmer, carrier, manufacturer, shipper, and operator of village communities. Plaintiff is, and the court finds it to be, subject to the provisions of the Fair Labor Standards Act.

Coverage under the Act for employees, so as to entitle them to the benefit of minimum wage protection, and payment of overtime for hours of work in excess of 40 per workweek, depends on whether they themselves are engaged in commerce, or in the production of goods for commerce (Sections 6(a) and 7(a) of the Act). Whether an employee is to be held covered as one engaged in the production of goods for commerce, depends on whether he was employed either (a) in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods; or (b) in any process or occupation necessary to the production thereof (Section 3(j) of the Act). By Congressional amendment in 1949, the words "closely related" have been inserted in the aforementioned section before the word "process", and the words "directly essential" have been substituted for the word "necessary"; but this amendment was not made retroactive, and has no application to the issues of this case.

Plaintiff does not dispute that its employees, with the exception of a single group, are engaged in commerce or in the production of goods for commerce, within the meaning of the Act. The exception referred to relates to the work of certain employees who perform the work of repairing and maintaining plaintiff's dwelling houses, and furnishing related community facilities and services to

those who occupy such houses, these being in the ma
employees of plaintiff. As to such maintenance and r
pair employees, the contention of plaintiff is that, whi
so engaged, they are not in any process or occupatio
necessary to the production of goods for commerce. D
termination of this aspect of the case is deferred to a su
sequent place in these findings. It is appropriate to fi
at this point, and it is found by the court, that all activ
ties of the defendants other than those concerning whi
the issue of coverage under Section 3(j) is raised, a
and have been within the coverage of the law, such e
ployees being either engaged in commerce or in the pr
duction of goods for commerce.

Recovery under the Act has two aspects. An employe
is excluded if his activities are such that he is engage
neither in commerce, nor in producing goods for com
merce (or engaged in an occupation necessary to produ
tion). On the other hand, an employee may be covere
by the Act because he is engaged in the production
goods for commerce or in an occupation necessary to su
production, but may not be entitled to the overtime pr
tection of the Act because of the applicability of one
another of the exemption provisions. In this case, plai
tiff relies on the following exemption provisions: Sectio
13(a)(6) (agricultural activity), Section 7(c) (suga
processing), Section 13(a)(2) (retail or service establis
ment) and, in one instance, Section 13(a)(1) (administra
tive or supervisorial activity).

The record shows that in numerous weeks various de
fendants worked for hours beyond 48, and in all such in
stances, hours of work beyond 48 were compensated a
overtime rates; this includes employees engaged in agri
cultural activities. Overtime was also paid for hours i
excess of 8 per day, for work on certain designated holi
days, and when an employee was called to work on hi

scheduled day off. Since 1943, office and warehouse employees have received overtime for hours excess of 40 per week; and during the off-season, overtime has been paid for hours in excess of 40 per week to mill and shop employees.

The recovery of overtime pay sought in this action by defendants is limited to hours in excess of 40 per week, up to and including 48.

Agricultural Activities.

Plaintiff contends that all of its employees are employed in agriculture, as the term "agriculture" is defined in the Act, and are therefore exempt from the entire operations of the Act, pursuant to Section 13(a)(6) thereof. The definition of "agriculture" contained in Section 3(f) is sufficiently broad to cover every operation of preparing the soil, cultivation, growing of the sugar cane, harvesting, and any practice performed by a farmer or on a farm either as an incident to or in conjunction with such farming operations, including preparation and delivery to market where this is done by farmers. An employee is therefore exempt from the protection of the Act by virtue of Section 13(a)(6) if, but only if, his work falls within the specific language of Section 3(f). Such, too, has been the interpretation expressed by the Administrator of the Act (Interpretative Bulletin No. 14).

Under this definition, activities exempt from application of the Act with reference to the growing of sugar cane at plaintiff's plantation, include the preparation of suitable seedbed in the cane fields; planting; ratooning; cultivating, spraying of fields with insecticides and herbicides; elimination of competing weed growth; clearing of stones; spreading of irrigation water and operation of irrigation controls; laying, moving, or removal of field irrigation flume; patroling of irrigation ditch lines; clean-

ing and weeding of irrigation reservoirs, drainage ditches and tunnels; fertilizing and other activities to improve the physical condition of the soil; fire protection; activities designed to guarantee or improve the growth of the crop; grading of cane fields; filling of holes, gulches and ditches in fields; and harvesting operations performed to remove the crop from its growing position in the fields. These constitute farming operations, together with those activities of an incidental and conjoint nature, such as the picking up and reloading of cane stalks which have fallen from cars, the laying and shifting of sectional tracks in the fields, and the loading and moving of cane cars placed upon movable tracks and assembling the harvested crop at centralized points on the main line railroad, to commence transportation to the mill. Employees engaged in such operations, or in activities incidental to or in conjunction with them, are eliminated from the protection of the Act while engaged in such practices.

In accordance with these findings, the work of defendants which falls into one or another of the categories specified above, is exempt from operation of the Act, up to and including the point at which the crop is harvested. That point, which terminates the agricultural aspect of plaintiff's operations, occurs with the concentration of cars loaded with cane, upon the main line railroad operated by plaintiff, for transport, through intermediate processing, to the sugar refinery.

Transportation.

Plaintiff contends that the operation of its main line railroad, and the work performed by its locomotive engineers, firemen, brakemen, and other employees connected with its railroad transportation system, are exempt both under the agricultural exemption of Section 13(a)(6) and the sugar processing exemption of Section 7(c). The

latter section exempts employees engaged in the processing of sugar cane into sugar (but not refined sugar), but only when they are employed in a place of employment where the employer is engaged in the act of processing cane. The Administrator has interpreted this section to exempt employees who directly engage in processing activities, or who perform operations so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities to the establishment; provided that such work is performed in the place where the processing actually occurs (Interpretative Bulletin No. 14). Congressional debates show that the purpose of the section was to relieve processors of seasonal agricultural commodities from the hour provisions of the Act so as to enable them more easily to conduct their operations during the peak seasons (Interpretative Bulletin No. 14).

Neither Section 13(a)(6) nor 7(c) applies to the activities of plaintiff's railroad employees. The train crews are not engaged in any act of producing sugar cane, or in any act incidental to or conjoint with the production of sugar cane; nor in processing cane into sugar at the mill, where the processing occurs. It is immaterial that they are employed by the same company which employs the farmhands and processing crews, since the determination of coverage must turn on the work of the employee.

> "The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation incident to farming.
>
> * * * *
>
> "There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provi-

sions of the Act." (*Calaf* v. *Gonzalez*, 127 F.2d, 934, 937, 938.)

In determining whether an employee is exempt from the Fair Labor Standards Act either under Section 7(c) or Section 13(a)(6), the sole criterion is the character of the work performed by the employee, as disclosed by the record (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Walling* v. *Snyder Min. Co.*, 66 F. Supp. 725). Section 7(c) does not embrace activities which, though related and necessary to mill operations, are not performed conjointly with processing at the establishment where processing takes place.

Railroad operation is a systematic business calling for the employment of skilled, experienced men, trained to quick, keen perception (not farmhands or mill hands) for handling locomotives and moving cars (not the goods in transit), and for the maintenance of roadbed, track and structures, and roundhouse care and servicing of locomotives—all specialized technical work. Railroading is not farming or processing, nor intended by the Act to be a part of either. Here, the transportation operations are very substantial, occurring over many miles of trackage, and hauling hundreds of thousands of tons each year; and the investment in the railroad system, amounting to nearly a million dollars, is quite considerable. It is notorious that in years past some sugar plantations in Hawaii hired a common carrier utility company, whether from economy or lack of capital, to install a railroad system, to perform the work of hauling cane from fields to mill yards.

If Congress had said that raw *sugar production* should be given an exemption from the operation of the Act, a different situation would be presented. That Congress saw fit not to do this, is in itself significant. The parts

of the Act here dealt with exempt agricultural or farming activities on the one hand, and processing on the other. The exemptions are separate and different, one of them applying both to minimum wages and overtime hours, and the other applying only to overtime hours. The transportation system of plaintiff is such that it constitutes a separate activity, so distinct in its nature that it is not reached by either of the exemptions.

Evidence given by plaintiff's office manager establishes that the employees of the railroad system are not attached to the Field Department or the Factory (Mill) Department, but instead are carried on the payroll records of the Service Department. Plaintiff has not treated the railroad employees as within the exemption of Section 13(a)(6), for during off-season these employees have been paid overtime after 40 hours of work. Subsequent findings on the activities performed by the railroad employees disclose that they are not ordinary farmhands, and do not perform agricultural activities. The railroad system is operated as a year-round pursuit; the element of seasonality does not enter into sugar production in the Territory of Hawaii. "Continuity of employment in the production of Hawaiian sugar is comparable to employment in manufacturing operations that have minor seasonal fluctuations rather than to typical mainland agricultural operations. The equable climate of Hawaii makes possible the continuous growth of sugar and it is technically possible to carry on every type of operation every day in the year". (Def. Ex. 3B, p. 64).

The operation of the railroad, as disclosed by this record, is not a practice performed "in conjunction with" farming operations. The activities of the railroad crew, and of those employed in activities relating to maintenance, upkeep and operation of the main line railroad system, occur subsequently to and independently of the

farming activities, albeit coordinated thereto. On its records of operating costs, plaintiff distinguishes between harvesting and main line transportation.

Nor is the operation of the main line railroad "incidental" to the farming activities. The Administrator of the Act regards transportation as more closely linked to processing operations. This has been his view since 1943 (Administrator's Release G-322). This view finds support in several decisions of the United States Court of Appeals for the First Circuit dealing with the Puerto Rico sugar industry (*Bowie* v. *Gonzalez*, 117 F.2d 11; *Calaf* v. *Gonzalez*, 127 F.2d 934; *Vives* v. *Serralles*, 145 F.2d 552). In those cases it is held that the transportation of cane is not incidental to farming and therefore not exempt under Section 13(a)(6) (*Calaf* v. *Gonzalez*, supra, 127 F.2d at 936-937.) In *Vives* v. *Serralles*, supra, the agricultural exemption was held to end at the point of concentration of harvested cane, and this point was fixed as of the time when cane loaded into cars was moved from portable track onto the main line permanent tracks; at this point the dividing line was fixed between activities exempt under Section 13(a)(6), and activities not so exempt.

This seems a useful, logical and necessary point of cleavage. It is also in accord with plaintiff's long-established practice, in the maintenance of its records, of separating field activities from transportation at the point where cane cars are placed on the main line railroad.

The sole object of plaintiff's operation is the production of sugar and molasses; and as these are manufactured in its mill, it might well be argued that operation of the mill is the dominant element, and that the growing of the raw material, sugar cane, is the subordinate or incidental element. It serves no purpose to resolve such an argument, for it is clear that plaintiff engages in many separate enterprises which, taken together, constitute a hybrid type

of business (see *Phillips Co.* v. *Walling*, 324 U.S. 490, at 495).

Hauling cane on the main line railroad is not a part of harvesting operations, since the gathering of the crop is completed on the fields on which it is grown prior to transportation; and such transportation constitutes neither a storing of such crops, nor transportation either to storage or market. Transportation, as plaintiff engages in it, is a necessary preliminary to the operation of plaintiff's processing business in its mill, where the cane undergoes a substantial change in order to create raw sugar, from which state it is later further transformed into refined sugar, the main product which is sold.

Portable track is laid on the fields where cane is grown; but the permanent main line transportation is not located on the farm in the same sense. True, it is located on the plantation property, but the word "plantation" refers simply to the geographical area of nearly ten thousand acres on which plaintiff conducts all its operations. Obviously cane is not grown on the right-of-way occupied by the fifty-six miles of permanent main line railroad track. Land is set aside exclusively for railroad purpose.

The point where the main line track is joined by the portable track is the point at which harvested cane is concentrated for transportation, and at this point the agricultural exemption activity ceases and the railroad operation commences.

The court finds that employees who are employed in or on the roadbed, track, structures, cars and locomotives of plaintiff's main line railroad system, including roundhouse and rolling stock, repair and building shops, and flagmen, watchmen and dispatchers, are not exempt from the overtime provisions of the Act.

Mill.

Plaintiff contends that employees whose work is performed in the mill are exempt under both Sections 13(a)(6) and 7(c). Mill activities commence immediately after the produce has been delivered into plaintiff's storage yard and brought alongside unloading platforms. Processing begins with the weighing, unloading and cleaning of the cane, and continues through crushing, juice treatments, crystallizing, and the bagging of the product and its removal from bagging and sewing machines, and its deposit in an adjacent warehouse, bins, tanks, or directly into cars or trucks for shipment. With these several operations through the factory, the processing is begun and finished in the place where the processor is so engaged; that is to say, the entire operating plant devoted to processing usage, whether within the mill itself or in the open yard, and whether the work there performed is mechanical or manual.

Such activities are not exempt under Section 13(a)(6). The mill operations are so conducted as to assume the character of a distinct business enterprise of an industrial nature; hence the mere fact that the processor is also engaged in producing a farm crop, and is processing only commodities grown by him, does not bring all of his operations within the Act's definition of "agriculture". The processing of sugar cane is surely no less an industrial operation than the stemming and fermenting of leaf tobacco; these activities were held to be non-agricultural because they changed the form and nature of the crop (*McComb* v. *Puerto Rico Tobacco Marketing Cooperatives Ass'n.*, 80 F.Supp. 953, affirmed 181 F.2d 697).

The mill operation is not a subordinate part of farming; it constitutes a large operation that follows the pattern of the industry in the Territory of Hawaii. A separate work force is employed for the processing operation in the

mill; it does no work in the fields; it is paid in accordance with a scale of hourly rates which are different and distinct from the system used, partly at contract rates and partly at hourly rates, to pay farm labor. On its payroll records, and in the keeping of its accounts for purposes of making income tax returns, plaintiff segregates mill employees from those engaged in field activities. During off-season, plaintiff pays overtime after 40 hours to employees of the mill, but not until after 48 hours to employees engaged in the farm work.

The Court of Appeals for this circuit has warned against enlarging the term "agricultural laborer" beyond the usual idea that it suggests. Enlargement beyond common usage would produce only confusion. The test laid down is whether the product has been subjected to industrial activity. Industrial activity commonly means the treatment or processing of raw products in factories (*North Whittier Heights Citrus Ass'n.* v. *NLRB*, 109 F.2d 76, certiorari denied, 310 U.S. 632, rehearing denied, 311 U.S. 724). This decision, although interpreting the agricultural exemption of a different act, has been widely followed in its basic reasoning, and has recently been reaffirmed in *Miller* v. *Burger*, 161 F.2d 992.

The determination of this court is suported by the views recently expressed both by the Solicitor of Labor and the Administrator of the Wage-Hour Division (2 CCH 14,068-14,071). Since 1941, the Administrator has taken the position that the exemption for agricultural employees "does not apply to sugar mill employees, even if the only cane ground in such a mill is cane grown by the sugar mill owner in his own fields" (Administrator's Release R-1568, published in 1942 ed. WH Manual, p. 408). It is also the current view of the Board which administers the National Labor Relations Act, which by Congres-

ional direction contains the same definition of "agriculture" that is to be found in the Fair Labor Standards Act (*In Re Imperial Garden Growers*, 26 LRRM 1632; 91 NLRB No. 167). See also *Vives*, *Bowie*, and *Calaf* cases, supra.

It is clear, however, that the activities under discussion are covered by the sugar processing exemption. Accordingly the work of employees which takes place in the mill, in connection with the operation of processing machinery and activities closely and intimately connected therewith, are exempt under Section 7(c).

Several activities, while occurring in the mill, are not exempt because they do not constitute a part of the processing operations. Activities performed on bagasse, a by-product which is used for fuel, are not exempt because such activities do not constitute the processing of cane to obtain sugar or syrup, nor is it processed to obtain bagasse. The exemption is limited to the processing of cane into sugar or into syrup. This finding coincides with the long-established view of the Administrator (Interpretative Bulletin No. 14).

Where an employee's activities are connected with generation of electricity, some of which is used in the mill, but also in many other operations, including the lighting of employees' houses, administrative offices, repair and service shops, and the sale of surplus amounts to a public utility company, the exemption does not apply because of the commingling of exempt with non-exempt activities in the same workweek. The matter of commingling iis later discussed in greater detail in these findings.

Weekend Shutdown.

At the earlier trial, the defendants contended and the court held, that the activities in and about the mill during weekend shutdown, which consist of cleaning and minor

repairs, were not exempt under Section 7(c), for the reason that they occur at a time when no processing is taking place. In consequence, an employee who performed 40 hours of exempt work in connection with processing operations, and additional hours of work during the week-end shutdown, was held to be non-exempt for the entire week.

Upon additional evidence and a new record in this retrial, and reconsideration of this issue, it would appear that the week-end activities in the mill should not be held to defeat the exemption provided by Section 7(c). While the shutdown period consists of 24 consecutive hours, processing operations are not completely suspended during that interval. The crystallization processes of sugar remaining in the machines continue. Key employees in the fireroom, boiler room, and power house remain engaged in their regular activities. Though it is impossible to circumscribe with exactness the period during which no processing of sugar, in the literal sense, takes place, it would seem that such period comes to but a few hours, less perhaps than a full working shift, and partaking partly of the end of one shift and partly of the early portion of the next.

Employees who engage in the weekend cleaning and repair activities, work solely within the mill, and upon the very processing machinery which they operate during the remainder of the week. These employees also do the same kind of work while the mill is in operation, as an incidental activity connected with processing. In such circumstances, and in light of the exemption which Congress intended should be enjoyed under Section 7(c), the non-processing activities in the mill during weekend shutdown would appear to be too incidental and subordinate a factor to defeat exemption.

Accordingly, the court finds upon this record that the activities performed during weekend shutdown in the mill are not such as to defeat exemption, if it is otherwise applicable.

Off-Season.

The annual shutdown of the mill during the so-called off-season is a period when there is a total cessation of processing operations. Machinery and equipment located in the mill are completely overhauled, major repairs are made, and new machinery is installed. Generally the mill is shut down for a period of between 3 and 5 months. According to the evidence, plaintiff's off-season lasted 5 months in 1941; 3½ months in 1942; 3½ months in 1943; 4 months in 1944; 3½ months in 1945. In 1946, it ran from December 22 to February 9, a period of 7 weeks; this was an unusually short off-season, and doubtless relates to the occurrence of a strike lasting from September 1 to November 19, 1946.

During the off-season, mill employees engage exclusively in major cleaning and repair work, in overall preparation for the subsequent reopening of the mill. Additional men are brought in from other departments to participate in the overhaul which occurs in and about the mill, its machinery and equipment. Field employees are brought into the repair and service shops, to supplement the regular crews, because of the increased load of work. These facts not only establish the substantial nature of the off-season operation in preserving and enhancing capital investment*, but also account for the maintenance by plaintiff of a stable labor supply throughout the year, during

* "In October 1947 the HSPA Plantation News stated: 'Estimates of the amount of money being spent in 1947 and 1948 for improvements and new equipment or sugar plantations run as high as $20,000,000 and actual outlays may be even higher.'" (Def. Ex. 3B, p. 40.)

which the number of man-days of work performed does not vary, regardless of season.

Not a particle of sugar is processed in the off-season.

It is plain, and the court finds, that the work which takes place in the mill during off-season is not exempt under Section 7(c). This holding produces no inconsistency with the finding in regard to weekend shutdown, inasmuch as the two differ vastly in purpose, nature, scale, and duration.

It has long been the Administrator's view that the exemptions provided by Section 7(c) do not apply during any dead season or off-season, when processing activities are suspended entirely for a substantial and prolonged period of time (Administrator's Release R-1892; Jan. 25, 1943). This view has been uniformly upheld by the courts. Such was the ruling in the sugar industry in Puerto Rico in the case of *Maisonnet* v. *Central Colosso, Inc.*, 2 WH Cas. 755; and the decision has been the same in reference to the cotton seed processing industry (*Heburg* v. *Independent Oil Mill, Inc.* 5 WH Rcpts. 777 (W.D. Tenn.); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F.Supp. 393, 6 WH Repts. 312 (S.D. Cal.)).

It is also worthy of note that plaintiff has paid, for a number of years, and throughout the period covered by this action, overtime for hours of work in excess of 40, to all mill hands, employees of the repair and service shops, and others who participate in the off-season work in and about the mill.

Repair and Service Shops.

Plaintiff claims that the employees of its repair shops are exempt both as agricultural employees and under the sugar processing exemption.

The agricultural exemption of Section 13(a)(6) is inapplicable. Machine shop men, welders, electricians, painters, carpenters, and others employed in the repair shop department, perform no work of an agricultural nature, or at a time or place conjoint with or incidental to the farming process, or on a "farm" in the sense in which that term is used in the statute. Plaintiff itself has always regarded these employees as a unit separate from the field employees. In the structure of plaintiff's business, agricultural workers comprise the Field Department; employees of the repair shops comprise the Service Department. Workers in these respective categories are carried on separate and distinct pay-rolls. For cost accounting and income tax return purposes, plaintiff makes the same distinction in its records between these departments. As subsequent findings show, plaintiff has never treated repair shop employees as falling under the agricultural exemption, inasmuch as, during off-season, repair shop employees have been paid overtime for hours of work in excess of 40 per week; this, of course, is a payment not required to be made to employees engaged in agricultural work, whether it be off-season or grinding season.

Neither is Section 7(c) applicable to exempt these employees. Their work is not that of engaging in processing, or in any part of processing, nor is their work so integrated with processing as to be a portion thereof, incapable of segregation. Plaintiff has not treated the repair shop employees as part of its mill operations. Payrolls and cost accounting records for income tax purposes show the employees of repair shops separately from the mill hands. The activities of repair shop employees relate not alone to the mill, but to all aspects of plantation operations, including the field, village facilities, administration buiding, etc.

Repair shop employees are not occupationally attached to the mill. The headquarters out of which they work is in each instance a separate structure, in which they generally perform the major portion of their work, to which they regularly report each day, and in which they receive supervision and instructions. These structures are located at varying distances, up to 300 feet, from the mill. When occasion requires them to be elsewhere than in their shops, they perform services for every operation on the plantation, not the mill exclusively. Most of them do not generally perform work inside the mill building, except during off-season, when processing is suspended. They are under separate foremen and supervisors. There is no interchange shown, during the grinding season, of personnel, equipment, or materials between the mill and the repair shops.

It is plain that the repair shops constitute, and they are found to be, self-sufficient units, operated not as an incident to any other operation exclusively or dominantly, but rather as an integral part of the over-all combination of separate enterprises jointly conducted by plaintiff. If the employees of an independent machine repair shop performed the repair activities under discussion, they would not be exempt from the overtime provisions of the Act. The fact that such work was done by employees of plaintiff, under the circumstances here presented, affords no stronger basis for applying the exemption.

This determination coincides with the view expressed by the Administrator, both in his official releases (Interpretative Bulletin No. 14) and in the position asserted in a brief filed by him in this case with the Court of Appeals. Judicial authority treating of the same issue likewise supports this finding. In *Walling* v. *Bridgeman-Russell Co.*, 2 WH Cas. 785, (District) Judge Bell held that the term "place of employment" as used in Section 7(*c*), means

those portions of the establishment devoted by the employer to the actual processing operations, hence the exemption does not apply to employees who perform their duties at places not devoted to processing operations. He held the exemption inapplicable to electricians, carpenters, tinsmiths, firemen, engineers, garage employees who washed and greased trucks, watchmen, janitors, warehousemen, and laboratory technicians, although the degree of separateness and specialization in that case does not appear to approach the situation in the instant case.

In *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 at 943 (D.C. Minn.), employees who worked at grading, packing and loading poultry, in a room adjacent to the one where slaughtering and dressing operations occurred, were held not employed in a place of employment where the exempt processing activity was performed; this was the holding despite the fact that the activities held non-exempt were performed on the processed product. In the case at bar, the employees under discussion do not handle cane, sugar, syrup, or molasses; their activities are confined to working on machinery, equipment, and structures.

The crucial point is that Section 7(c) does not exempt entire industries from the overtime provisions of the Act, but only the specific processes therein mentioned. Thus, while the activities of employees engaged in handling, slaughtering and dressing operations in a meat packing plant were held exempt, employees in other departments, such as those engaged in meat-curing and sausage-making, were held outside the scope of the exemption provided in Section 7(c) (*Fleming* v. *Swift & Co.*, 41 F. Supp. 825, affirmed 131 F.2d 249). To the same effect, see *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. 2d 262 (S.D.). See also *Shain* v. *Armour & Co.*, 50 F. Supp. 907 and *McComb* v. *del Valle*, 15 Lab. Cas. 74,679 (D.C. P.R.).

Mill Village Maintenance.

Plaintiff contends that its employees who perform repair and maintenance work on company dwellings occupied by plaintiff's employees, and who supply village services and facilities to the employees living in the plantation villages where these houses are located, are excluded from coverage under the Act upon the ground that they do not work in any process or occupation necessary to the production of goods for commerce. Alternatively, if this contention is overruled, plaintiff invokes the exemptions of Sections 13(a)(6) and 13(a) (2).

The question of coverage is plainly one that must be decided upon the facts peculiar to each case. The Administrator has expressly left the question of coverage open, evidently recognizing that decision might well vary with the given situation. No court decision has been found that passes squarely on facts similar to those here present.

Work of a repair and service nature has frequently been held covered by the Act as a type of activity necessary to the production of goods for commerce. A few decisions of this kind may be noted: Repair of boats used in interstate commerce (*Walling* v. *F. S. Lowe & Son Boatways*, 5 WH Cas. 937); mechanical work for an independent machine corporation whose chief business consisted in servicing the tools and equipment of a company engaged in mining and shipping of coal in interstate commerce (*Princeton Mining Co.* v. *Veach*, 5 WH Cas. 734); painting, repairing, and reconstructing trucks which were brought to the employer's plant and by customers who owned them, and which were used in the interstate transportation of goods (*Walling* v. *Sturm & Sons*, 6 WH Cas. 131); maintenance men, mechanics, and mechanics' helpers who worked at garages on trucks leased by their employer to customers making substantial use of the trucks

in interstate commerce (*Skidmore* v. *Casale, Inc.*, 6 WH Cas. 33). Also to the point are *Claudio* v. *Sobrinos De Portilla, Inc.*, 5 WH Cas. 484, holding the Act applicable to employees of a corporation operating a factory and machine shop, the greater part of whose business was the repair and servicing of industrial concerns producing sugar for commerce; and *Agosto* v. *Rocafort*, 5 WH Cas. 176, holding the Act applicable to a mechnic engaged in repairing and overhauling trucks operated by an employer in a trucking business used chiefly to transport cargo from concerns producing sugar, to be shipped in commerce.

Maintenance workers, watchmen, and similar employments have also been held covered. These employments were held covered in *McComb* v. *Russell Co.*, 17 Lab. Cas. 76,781; by the United States Court of Appeals for the Fourth Circuit in *Slover* v. *Wathen*, 140 F.2d 258; by the United States Court of Appeals for the Seventh Circuit in *Engebretsen* v. *E. J. Albrecht Co.*, 150 F.2d 602; and by the Supreme Court in *Walton* v. *Southern Package Corp.*, 320 U.S. 540, and in *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

These decisions are readily distinguishable from the situation at hand, in that the employees involved therein performed work or services in, upon or directly relating to the very buildings, equipment, or instrumentalities which were used in the production of goods for commerce. The case here presented is one step removed, in that the repair and maintenance work is performed in and upon, and the service is rendered for the dwelling houses inhabited by plaintiff's production employees.

A series of cases, which have come to be known as the cookhouse or cafeteria cases, deal with an analogous situation. In *Consolidated Timber Co.* v. *Womack*, 132 F.2d 101, the United States Court of Appeals for this circuit

held the Act applicable to a baker employed in one of two cookhouses operated by a corporation engaged in logging and lumbering. It was held that the cookhouse was a necessary part of the company's production of goods for commerce, operated not with the intent or purpose of showing a profit to the owners from the sale of food or service, but rather to render a necessary assistance to the company's business, which was that of producing logs in interstate commerce:

> "The cookhouse was not a separate or independent establishment; it was actually a *part* of the company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence. Neither cookhouse was in competition with any private restaurant for there is no evidence of an effort to secure the patronage of the general public; the service was sold at cost to those whom the cookhouse was intended to serve: the loggers. The principal activity of the cookhouse definitely was not to furnish service to the consuming public, as such, but was to serve the employees of the company." (Page 107)

The job of the cookhouse employee was held to assist the activities of the loggers by keeping their board close to their place of work, thus rendering it easier for the corporation to maintain a proper organization of its loggers, and forwarding their work by furnishing the food whereby the men were given the strength to pursue their labors.

Many cases are in accord with this decision. The United States Court of Appeals for the Eighth Circuit, in *Hanson* v. *Lagerstrom*, 133 F.2d 120, followed our circuit, holding the Act applicable to one who assisted in preparing and serving meals, and maintaining a kitchen operated to benefit employees of a concern engaged in handling pulpwood, which was then converted into products sold in interstate commerce. A federal district court in Indiana held the Act applicable to a night manager

employed by the owner of a cafeteria located in a war plant, to serve employees working in the plant who manufactured war materials shipped in interstate commerce; the cafeteria, though independently owned, was held an integral part of the organization of the manufacturer, and a necessary part of the facilities used by the manufacturer (*Ferguson* v. *Prophet Co.*, 6 WH Cas. 284). A federal district judge in Massachusetts similarly applied the Act to employees working in their employer's commissary, which was located in a railroad station and served as a kitchen and storeroom for the employer's retail stands and train service department in the same station, and for the employer's retail stands in railroad stations in other cities (*Walling* v. *Armstrong Co.*, 5 WH Cas. 474). Employees in a canteen and cafeteria operated, on premises of Republic Steel Corporation, by an independent restaurant concern were held covered in *McComb* v. *Factory Stores Co.*, 81 F. Supp. 403; coverage of the Act was there decided in favor of cooks, assistants, counter girls, dishwashers, and porters. The Supreme Court of Michhigan held the Act applicable to employees engaged in preparing food at plant cafeterias owned and operated by a large industrial corporation which sells food solely to plant workers during their lunch and rest periods (Basik v. General Motors Corp., 5 WH Cas. 1061).

The foregoing decisions turn on the finding that the work performed by such service employees is itself a part of an over-all integrated effort for the production of goods for commerce. Supplying such services, and maintaining such supply, constitute activities covered by the Act, where they have a close and immediate tie with the process of production for commerce. Although each case depends on its own facts, the decisive elements are suggested by our Court of Appeals in *Womack's* case, supra, 132 F.2d at page 107:

> "Was not the greater number of diners at the cookhouses engaged in the production of goods for commerce? Were not the cookhouses an integral part of an organization devoted to the production of goods for commerce? Does it not follow, reasonably and logically, that the greater part of the services rendered by the cookhouses was in interstate commerce rather than intrastate?"

Three decisions reaching a contrary result are easily distinguishable, and are based upon reasoning which supports the principle of *Womack*. *Kuhn* v. *Canteen Food Service, Inc.*, 77 F. Supp. 585, dealt with a restaurant operated, not by an employer engaged in the production of goods for commerce, but by an independent concern: and it was not operated as a part of facilities devoted to production of goods for commerce. Judge LaBuy accepts the principle laid down in Womack's case, saying, at page 591:

> "The Court is convinced that in cases where the production of goods is in an isolated spot where board cannot readily be obtained by employees, that (sic) it would be necessary for the company to furnish board to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods."

Again, in *Bayer* v. *Courtemanche*, 76 F. Supp. 193, 196, a similar case was presented. Judge Smith there said:

> ". . . there has been no showing that the time for lunch was too short for the production workers to eat outside, nor that restaurants were not available nearby, nor that the service in them was inadequate for the workers in that area, nor, indeed, that any great proportion of the production employees of the plant availed themselves of the cafeteria at meal times. "Had any of these elements been shown by the plaintiff, it might be that his work could be considered necessary * * *"

Judge Yankwich also found against coverage in *Tipton* v. *Bearl Sprott Co.*, 9 WH Cas. 620, where a restaurant, not operated by Columbia Steel Company but by an independent contractor, was maintained at most as a convenience for employees at Columbia Steel, at a location in a city where numerous other restaurants were immediately available to Columbia's production workers. In a well-reasoned opinion, the court reviews the cases and bases its decision upon the fact that the cafeteria was operated independently of the company producing goods for commerce, was not located in any isolated area, was not shown to be patronized by any substantial number of the steel company's employees, and represented only a convenience to such employees rather than a necessity; furthermore, that the steel company did not control the hours, wages or conditions of work of the cafeteria employees, and such cafeteria was in no way a part of Columbia's effort to produce steel.

In the case at bar, existing conditions are such that it has been necessary for plaintiff to furnish housing and community services to its production employees. The plaintiff's villages are located both in isolation and insulation from the rest of the Territory; these villages are located upon plaintiff's lands, and are many miles from any city. No other housing in adequate quantity, except that provided by plaintiff, is shown to be available to plaintiff's employees. Historically, paintiff constructed these houses and estabished these villages for the purpose of supplying necessary dwellings for a stable labor pool which plaintiff desired to be in close proximity to its operations.

Maintenance of village facilities and dwelling repairs were carried on by plaintiff as a part of its over-all production operations, not as a matter of mere convenience for its employees. Many of the employees of plaintiff

who work on dwellings, and in connection with village facilities, are a part of plaintiff's production operations, being attached to various of the repair shops, such as the carpenter, plumbing and paint shops, which perform activities for the mill, in regard to production machinery and equipment, and for administration and office buildings. Housing and community services represented part of the wage payment made to plaintiff's employees in the form of perquisites. Abolition of the perquisite system in 1946 did not nullify either the original purpose of the housing, or the continued effectuation of that purpose. Indeed, plaintiff expressly undertook a contractual obligation with the union representing most of the defendants, to continue to furnish repairs and maintenance of housing, and village community services. At the same time, plaintiff expressed its intention not to make housing a profit-making venture as such.

More than 98% of plaintiff's employees inhabit its houses, and rental to outsiders is negligible; and among the latter are various individuals to whom plaintiff also rents space to operate commercial establishments needed in the villages. Doubtless the present availability of housing for rental to outsiders is related to the continuing mechanization of plaintiff's operations which naturally decreases the number of employees needed. The fact that the present relationship between plaintiff and its employees in regard to housing appears to be one of landlord-tenant, does not conceal the underlying realities. It is the duty of the court to look through the form to the substance. The 1946 conversion of housing and facilities into cash values, merely meant that these amounts were added to the employee's paycheck, but he paid back the same amount to the company as rental. Hence the form changed, but the substance remained unchanged.

Upon the foregoing facts, there can be no question that the operation and conduct of village facilities and housing are historically and presently an integral part of plaintiff's production effort. The only relevant court decisions passing upon repair work to homes occupied by employees of a concern engaged in interstate commerce, deal with city homes occupied by employees under genuine lease or sale arrangements. One such case is the decision of the federal district court for the Western District of South Carolina in *Morris* v. *Beaumont Mfg. Co.*, 6 WH Cas. 843. The act was there held inapplicable to carpenters and painters engaged in the construction, maintenance and repair of residences rented by a textile manufacturing concern to its employees. The company owned an average of 280 dwellings occupied by an average of 488 employees. The total average number of employees of the company was 1107. Occupancy of company-owned residences was optional with employees, and on the average more than half of them lived in homes owned by themselves or rented from parties other than the employer. All the residences owned by the company were in the city of Spartanburg, located on city streets, and interspersed with other dwellings not owned by the employer. The company's manufacturing plant was enclosed by a substantial fence within which all of its manufacturing activities were carried on; none of the houses were contained within the fenced area. The key to Judge Timmerman's decision is seemingly his finding that "The defendant does not maintain a mill village in the sense that the term is commonly used."

A similar decision is that of the District Court for the Western District of Virginia, in *Coomer* v. *Durham*, 9 WH Cas. 605. The employer was a contractor who contracted and sold houses to the employees of a company engaged in the production of coal for interstate commerce. The

coal company had at one of its operations 547 employees, of which number 412 lived in houses not owned by or rented from it, 75 lived in a village in houses purchased from the coal company, 42 lived in houses purchased by them in an entirely different village, and only 16 lived in company-owned houses. At all of its operations, the company had a total of 3251 employees, of which number 1334 lived in houses rented from it, 217 lived in houses purchased from the company, and 1700 lived in their own individual houses which had never been owned by the company. The villages in which the employees lived were not isolated communities; they were located on state highways linked with the federal highway system, and near to other communities. It was found that the coal company, from the start of construction, "planned to sell nearly all these houses and did sell virtually all of them just as soon as they were completed." Such sales, it was pointed out, were accomplished by a conveyance in fee simple by deed to the purchasers without restriction as to subsequent lease or resale; and subsequently to the original purchase, some of the purchasers had either rented or sold their houses to persons in no way connected with the coal company. Judge Barksdale found that it was not necessary, during the period of time covered by the case before him, for the coal company to provide housing for its employees. The contractor's employees were therefore held not covered by the Act.

In *Wilson* v. *Reconstruction Finance Corp.*, 5 Cir., 158 F.2d 564, 565, certiorari denied, 331 U.S. 810, the Act was held inapplicable to employees acting as firemen at a housing project, and to others who supplied water service to the inhabitants thereof, the inhabitants being production employees of two corporations engaged in interstate commerce. However, the firemen and water plant operators were employees of an independent contractor not so

engaged in interstate commerce. The court there said, "The independence of the employer of the plaintiffs and the employers of the housing occupants insulates the plaintiffs from the status of producers of goods for commerce."

The last three decisions, while holding against coverage, present a rationale which, when applied to the facts of the instant case, support a different conclusion. In origin and history, Waialua village was and remains a mill village, company-owned and company-controlled, in every sense of that term. The same is true of the smaller villages on plaintiff's plantation where its employees occupy company-owned dwellings. All these villages, and all of the buildings, houses, and other facilities existing therein, were created by plaintiff for the purpose of providing housing and community services for a stable supply of labor. These villages are located within the plantation area, and Waialua, the largest of them, was established in close proximity to the mill. Not only does plaintiff own the homes, but also the other services and buildings necessary to community life—the hospital, gymnasium, parks, playground, clubhouse. The opportunity to occupy or use any portion of these communities, their facilities and the dwelling houses therein, has always rested exclusively with plaintiff. Ingress and egress are subject to plaintiff's control.

While plaintiff's employees are not required under the collective bargaining agreement to live in company-owned houses, there is no evidence that they have any real choice over the matter. The possibility of purchasing homes of their own seems to be a remote and rare occurrence; the unique system of semi-feudal land tenure plays a role. Only to an inconsequential extent is it possible for employees to rent, at suitable locations near to their places of work, houses owned by anyone other than plaintiff. It

cannot be assumed to be accidental that, of 959 non-supervisory persons employed by the company, in the period to which this suit relates, only 16 lived in houses other than those owned by plaintiff.

The work done by plaintiff's employees in maintaining and keeping in proper condition the housing occupied by its production workers, is neither trivial nor insignificant to plaintiff's business of producing sugar. It represents a material contribution to plaintiff's production of sugar. Without the performance of such repair and maintenance work, plaintiff's housing and village facilities would fall into disrepair. Its employees would be unable to continue to occupy them, and there would be marked interference and damage to the continuation of production of goods for commerce. The close relationship between the maintenance of the mill villages and the production of cane and manufacture of sugar, is exemplified by the fact that mill village maintenance employees, such as carpenters, painters and plumbers, perform their work indiscriminately both on the buildings and facilities used by plaintiff to conduct its production operations, and on the dwelling houses. Occupation by plaintiff's production employees of its housing is to be considered in connection with the fact that plaintiff hauls many of its employees from their homes in the mill villages to and from their job sites. In the operation of its business, plaintiff has departmentalized its activities: the plumbing shop and paint shop have personnel comprising intact groups who perform necessary work both on plaintiff's production buildings and its housing. In the case of carpenters, all are attached to the carpenter shop, without segregation between village carpenters and industrial carpenters, except as to timekeeping.

It is in the light of these facts that decision must be made of the question presented. That question is whether

the work of mill village repair and maintenance is "necessary" to the production of goods for commerce. Judge Healy has pointed out that the term "produced" is broadly defined in the Act (*Culver* v. *Bell and Loffland, Inc.* 9, Cir. 146 F.2d 29, 32. The Supreme Court has said that the word "necessary", as employed in the Fair Labor Standards Act, should not be applied in a manner that would give it an unwarranted rigidity; it is a word "to be harmonized with its context" (*Armour & Co.* v. *Wantock*, 323 U.S. 126, 130-131. The issue there decided was whether a firefighting service was sufficiently necessary to the operation of a soap factory, to entitle such service employees to coverage under the Act. The Supreme Court said:

> "* * * no hard and fast rule may be transposed from one industry to another to say what is necessary in 'the production of goods.' What is practically necessary to it will depend on its environment and position * * * What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods.
>
> * * * *
>
> "A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance. The company does not prove or assert that this fire protection is so unrelated to its business of production that it does not for income-tax purposes deduct the wages of these employees from gross income as 'ordinary and necessary expenses.'"

(No claim is advanced by plaintiff that its expenditures for wages to its employees and for other purposes in the maintenance and repair of dwellings and village facilities, are not included in its income tax returns as part of its expenses of operation, 26 USCA Int. Rev. Code Section 23(a)(1).)

> "More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production." (*Armour & Co.* v. *Wantock*, Supra.)

Accordingly, the work performed by carpenters, painters, plumbers, and others was covered, because they contributed to "the maintenance of a safe, habitable building" (*A. B. Kirschbaum* v. *Walling*, 316 U.S. 517, 524), which was, in turn necessary to house, maintain, and keep in desired proximity to plaintiff's operations, employees whose work involved them directly in the production of goods for commerce.

Whether, since the amendment in 1949 of Section 3(j), such employees are covered for future work, is not here presented. The sole question for determination deals with the period between November, 1946, and September, 1947, which antedates the recent amendments. Hence, decision here is confined to the Act as it read at the time of the activities over which the suit has been brought and no intimation is intended as to the effect, if any, of the 1949 amendments of Section 3 (j), particularly since the factual picture may have undergone change since 1949.

It remains to determine whether the exemptions of Section 13(a)(6) or 7(c) are applicable. For the reasons heretofore given in respect of employees in the repair shops, neither exemption applies.

Commingled Work.

There are numerous instances shown of the performance by a particular defendant, within a single workweek, of some activities which are exempt under either Section 7(c) or 13(a)(6), and other activities which are non-

exempt. As a general rule, the engagement by defendants in non-exempt activities, in those workweeks where this is found to be the fact, was substantial; and even in those instances where such engagement was small in amount, it was regular and recurring.

As construed by the Supreme Court, the statute makes each workweek the standard to be considered in determining the applicability of overtime provisions (*Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 579). It would be contrary to the Congressional intent to grant the exemption for a workweek in which the employee performed some activities which Congress intended to be non-exempt. The Administrator has long held the view that, where exempt and non-exempt activities are commingled in a single workweek, the entire week is nonexempt (Interpretative Bulletin No. 14).

This view has been uniformly sustained in an imposing array of decisions. *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N.D. Ill.); aff'd. 131 F.2d 249; *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D.C. Minn.); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W.D. Ky.); *Walling* v. *Peacock Corporation*, 58 F. Supp. 880 (E.D. Wisc.); *Weeks* v. *Postal Tel.*, 1 WH Cas. 1177; *McComb* v. *Puerto Rico Tobacco Marketing Cooperative Ass'n.*, 80 F. Supp. 953 (D.C. P.R.), aff'd., 1 Cir., 181 F.2d 697; *Anderson* v. *Manhattan Lighterage Corporation*, 2 Cir., 148 F.2d 971, certiorari denied, 326 U.S. 722; *Jordan* v. *Stark Bros. Nurseries & Orchards Co.*, 45 F. Supp. 769 (D.C., W.D. Ark.); *Walling* v. *Bridgeman-Russell Co.*, 2 WH Cas. 785 (D.C. Minn.); *Wabash Radio Corp.* v. *Walling*, 6 Cir., 162 F.2d 391; *McComb* v. *del Valle*, 15 Lab. Cas. 74,679 (D.C. P.R.); *Sykes* v. *Lochmann*, 156 Kans. 223; 132 P. 2d 620; *Gaskin* v. *Clell Coleman & Sons*, 5 WH Repts. 581 (Ky. CC, *Mercer Co.*, 1942); *Loeb* v. *Ideal Packing Co.*, 7 WH Repts. 397 (Wisc. CC, Mill Co., 1944).

In the case at bar, there are a few scattered instances where a defendant was assigned to perform exempt activities for virtually the entire week, but also performed a non-exempt activity for a small portion of time, sometimes as little as an hour or less. It is in accord with judicial authority to stand on the plain meaning of the statute, and to hold the exemption inapplicable, no matter how little time was devoted in the particular workweek to non-exempt work. Departure from the statute would create rather than obviate practical problems, including the problem of where and at what point to draw the line. The instances where such a small amount of non-exempt work was performed in a week which otherwise would be exempt, are few and scattered. They do not present a consistent or recurring pattern, and it is not claimed by plaintiff that it cannot easily avoid such situations by assigning the non-exempt activity to some other worker who normally performs that type of work as a regular part of his duties.

Accordingly, where in any given workweek a defendant engaged in activities some of which were non-exempt, none of the exemptions pleaded by plaintiff applies to such workweeks despite the fact that nearly all activities performed therein were exempt.

Retail Exemption.

Plaintiff urges that Section 13(a)(2) is applicable to some of its employees. This section exempts any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. Upon the record of this case, it does not appear that any of the defendants fall within that provision; hence it is found that Section 13(a)(2) was inapplicable to all of the defendants.

Liquidated Damages.

In subsequent findings, determination is made that certain of the defendants are entitled to recover stated amounts as overtime compensation due and owing to them. Defendants seek liquidated damages in amounts equal to the unpaid overtime compensation found due to them.

The Act provides that any employer found liable for unpaid overtime wages, shall also be liable "in an additional equal amount as liquidated damages" (Section 16 (b)). In 1947, Congress passed the Portal-to-Portal Act, which contains provisions under which liability for liquidated damages, as well as unpaid overtime wages up to May 14, 1947, may be affected. Under Section 9 of that Act, no employer shall be subject to any liability, either for overtime wages or liquidated damages, if he pleads and proves that his failure to pay overtime was in good faith, in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged; but this is expressly limited to claims based on an employer's failure to pay overtime prior to the date of enactment of the Portal-to-Portal Act, which was May 14, 1947.

Under Section 10, a second special defense is provided, which is more narrowly drawn with respect to the number or type of agencies of the United States on whose conduct an employer places reliance. Under this section, no employer subject to the Act shall be subject to liability for overtime compensation or liquidated damages, based on the employer's conduct on or after May 14, 1947, if he pleads and proves that his conduct was in good faith, in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpreta-

tion, or any administrative practice or enforcement policy of the Administrator of the Wage and Hour Division of the Department of Labor.

A final special defense is created by Section 11, which gives the court discretion to award no liquidated damages, or award any amount thereof not to exceed the amount specified in Section 16(b) of the Act, if the employer shows to the satisfaction of the court that his act or omission giving rise to the action was in good faith, and that he had reasonable grounds for believing that it did not constitute a violation of the Act.

Plaintiff, by its pleadings, raised all three of these special defenses. However, these defenses were abandoned at the trial; no evidence was offered by plaintiff in support of these defenses, and nothing was "proved" or "shown to the satisfaction of the court" to support these pleas. In the absence of evidence to bring into operation any of the mentioned special defenses, there is no basis on which to deny full liquidated damages to those defendants who are entitled to recover, inasmuch as such is the requirement of Section 16(b) of the Act.

Costs and Attorney's Fees.

The defendants pray for costs and attorney's fees. The Act provides that the court "shall, in addition to any judgment awarded * * * allow a reasonable attorney's fee to be paid, * * * and costs of the action" (Section 16 (b)).

The amount of attorney's fee awarded should bear proper relationship to the facts of the case, and should be reasonable in light of the quantum of service rendered, the difficulties presented by the problem and issues involved, and the extent of recovery achieved.

The court will award an attorney's fee which takes into account the foregoing factors as they relate to the facts of this case, the occurrence of two trials and one appeal,

and the total recovery for all defendants, which, including liquidated damages, amounts to $6,729.02.

Costs of suit will also be ordered paid to the defendants who prevail in this action.*

Opinion of United States Court of Appeals for the Ninth Circuit, dated November 10, 1949

Before Stephens and Healy, Circuit Judges, and Fee, District Judge.

JAMES ALGER FEE, District Judge:

This is a proceeding for a declaratory judgment, brought by Waialua Agricultural Company, Limited, a corporation, against Ciraco Maneja and forty-seven other persons as defendants, individually and as representative of all other employees of plaintiff who are similarly situated. Included also were Local 145-7 of the International Longshoremen's and Warehousemen's Union, and Jack Hall, Regional Director, Territory of Hawaii, of the International Longshoremen's and Warehousemen's Union, individually and "as representative of all employees of the plaintiff who are named herein as defendants and of all other employees of the plaintiff who are similarly situated."

The complaint sets up a general description of the operations of the plaintiff corporation and alleges that a collective bargaining agreement was entered into between plaintiff and defendant International Longshoremen's and Warehousemen's Union, Local 145-7. The complaint likewise sets up a detailed statement of the duties of each

---

* The Findings of Fact and Conclusions of Law of the District Court are printed in the record used in the Court of Appeals, nine copies of which have been filed with the Clerk of this Court pursuant to Rule 21(4). See R. 190 *et seq.*, 308 *et seq.*

employee in somewhat vague terms. The prayer of the complaint is that the employee defendants named be declared employed in agriculture and, if not, each be declared to be engaged in the processing of sugar cane into sugar, and that certain of the employee defendants, while engaged in certain tasks in connection with the plantation villages, be declared not engaged in commerce or in the production of goods for commerce. The answer contains admissions and denials and prays a declaration that none of the employees and defendants are engaged in agriculture, and, while it is admitted that certain employees were engaged from time to time during certain work weeks in first processing, further prays the Court declare that none of them were engaged in processing as an adjunct to agriculture and that the Court declare all the employee defendants were engaged in commerce or in the production of goods for commerce, and that all of the employees were subject to the overtime provisions of the Fair Labor Standards Act and prays for an accounting.

There was then filed an elaborate stipulation which set up that competent witnesses would testify as to voluminous facts relating to the general situation. Part I of the stipulation, in paragraphs 1 to 37, inclusive, contains the agreement that the witnesses would testify to the organization of Waialua as a corporation and a detailed and meticulously precise statement of its operations and activities throughout the vast setup. Part II of the stipulation, under paragraphs 38 to 86, inclusive, contains the agreement that the witnesses would testify to a general description (not related by particular hours, weeks, months or years or to any particular calendar period) of the work performed by the forty-eight different employee defendants of the Plantation. Part III of the stipulation is

devoted to a limitation of the scope of the controversy and dispute and reads as follows:

> "It is Hereby Further Stipulated by and between the parties hereto as follows:
> "The controversy involved in the suit pursuant to which this stipulation is made and filed raises the question of whether the employees of the Plantation named as parties defendant herein and all other employees of the Plantation who are similarly situated are entitled to overtime compensation pursuant to the provisions of Section 7(a) of the Fair Labor Standards Act of 1938.
> "No controversy exists with respect to the application of the minimum wage provisions of the Fair Labor Standards Act of 1938 to the defendant employees herein or any other employees of the Plantation similarly situated as the lowest paid employee of the Plantation is paid at an hourly rate in excess of that required by the Fair Labor Standards Act of 1938.
> "The parties are agreed that any employee named herein as defendant who is held not to be subject to the Fair Labor Standards Act of 1938 or who is held to be exempt therefrom, and any other employee of the Plantation similarly situated is subject to the maximum hour provisions of the Hawaii Wage and Hour Law and must be paid at a rate of not less than one and one-half (1½) times the regular rate at which he is employed for all hours in excess of forty-eight (48) hours per week."

This stipulation was entered September 12, 1947.

So far as the record of the trial on September 18, 19, 22 and 23, 1947, was concerned, it appears the testimony consisted altogether of one witness for the defendants, who was the Regional Director for the Union, and one witness for the plaintiff, who was the Assistant Manager of the Plantation.

After the trial, the defendants filed an amended answer and cross-complaint November 3, 1947, wherein it was set up that the plaintiff had failed and refused since January

19, 1946, to compensate the defendants in accordance with the provisions of the Act. This was made an issue by the plaintiff in a reply to the cross-complaint, in which reliance was placed in part upon Section 10 of the Portal to Portal Act of 1947. However, pursuant to a joint motion for separate trial upon the issue raised by this portion of the defendants' amended answer and cross-complaint and plaintiff's answer and cross-complaint, the Court, by order dated March 22, 1948, granted the motion. This issue was never tried and is not here presented. We disregard this matter, for the Trial Court expressly directed entry of judgment upon the case presented by the original complaint and original answer according to the provisions of Rule 54(b), Rules of Civil Procedure. The cause must stand or fall on these alone.

The Court thereupon took these "issues" under advisement, and thereafter filed an opinion entitled in the record, "Findings with Conclusions," which appears in Waialua Agricultural Company, Limited, vs. Ciraco Maneja, et al, 77 F. Supp. 480. No findings of fact were made except as may appear therein. A judgment was then entered. This "judgment" does not relate to any of the individual defendants by name, but consists of a series of generalizations.

From this judgment, both sides appeal. Plaintiff attacks certain portions thereof. Defendants cross-appeal from other portions. Both appeals must be sustained. The "judgment" is a nullity. It gives no mandate or command as to the individual defendants named in the action. This document consists of a series of economic maxims which may or may not be applicable to the conditions and hours of work and overtime, if any, performed by Ciraco Maneja or Fumio Sunahara or Moses Fernandez or any other named individual defendant. It is true these expressions mention plaintiff and employees of plaintiff, as

may be noted. But there is no declaration of the rights of these defendants or any one of them either positively or negatively. There is not the positiveness of command or declaration required by a judgment.[1] The reason a judgment must be positive and founded upon fact is that it is to stand as res judicata between the parties and privies.[2] Unless the facts found as a basis for the judgment are definite and positive the ultimate characteristic of finality would be dissipated.

The second fatal defect in this pronouncement is that it lacks findings of fact. It is true, both parties refer to the "judgment" and opinion as though there were findings. But this mutual disregard of error which they had by one manner or another induced cannot avail to have this Court consider a judgment not founded in fact.[3] The Trial Court, in the opinion on file, indicated acceptance of the error superinduced by counsel and inherent in the inception of the case and in all the proceedings.

It is obvious no rule of conduct in respect to future activities and pay practices can be applied unless there are known and found as facts what work week, what employees, what activities and how connected with interstate commerce, agricultural or housing, through the particular employee. Otherwise, the process is not judicial but administrative or legislative. See Trans-Pacific Airlines, Ltd. vs. Hawaiian Airlines, Ltd., 9 Cir., 174 F.2d 63. The

---

[1] Watts vs. Waddle, 6 Pet. 389, 399; Drybrough vs. Ware, 6 Cir., 111 F.2d 548, 551.

[2] "* * * an issue must have been decided before it can come within the scope of res judicata." Pierce vs. Kunkel, 5 Cir., 151 F.2d 897, 898; Brown vs. Fletcher, 6 Cir., 182 F. 963, 966-83; Hughes vs. United States, 71 U.S. 232, 237; A. O. Smith Corporation vs. Petroleum Iron Works, 73 F.2d 531, 537, where it is said a prior determination must be based on the merits.

[3] Kelley vs. Everglades Drainage District, 319 U.S. 415, 421.

absence of findings as to the particular employees named as defendants leaves no pediment on which a judgment can stand.[4] The Trial Court cites Tennessee Coal, Iron & Railroad Co., et al. vs. Muscoda Local No. 123, 321 U.S. 590, and Jewell Ridge Coal Corporation vs. Local 6167, 325 U.S. 161, as instances in which declaratory proceedings were carried to conclusion in interpretation of the Fair Labor Standards Act. But in each of these cases, detailed and specific findings were entered.[5]

The difficulties caused by lack of findings precise and definite may be indicated. First, although the parties stipulate that the gist of the controversy is whether the individual defendants are entitled to overtime compensation, there is no evidence, finding of fact, conclusion of law or declaration of the judgment that any one of the defendants named or any one similarly situated ever worked overtime for any period, definite or indefinite, and that any of them are asked or may be compelled to work overtime in the future or that either the employer or the employee contemplates such overtime work.

The result of lack of this essential finding is to render the cause moot in this Court, for it leaves the critical issue of the case here without allegation, proof, finding of fact or positive judgment. In the absence of such structure, the proceeding is coram non judice. There was not shown in the findings and judgment a "case or controversy"

---

[4] Findings must be "sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision." Shapiro vs. Rubens, 7 Cir., 166 F.2d 659, 665; Schilling vs. Schwitzer-Cummins Co., U.S.Ct. of App., D.C., 142 F.2d 82, 84.

[5] See as to Jewell Ridge Coal Corporation vs. Local 6167, 53 F. Supp. 935, 937, 145 F.2d 10; as to Tennessee Coal, Iron & Railroad Co., et al. (directions for findings), 40 F.Supp. 4, 11, 135 F.2d 320, 322, 137 F.2d 176, 180, 321 U.S. 590, 603.

within the meaning of the Constitution.[6] If there were no basis for such a finding in the petition or evidence, the proceeding then must have been dismissed. For, failing this, there was no jurisdiction.[7] However, we need not determine whether the defect was fatal, since the cause must be remanded on account of the lack of essential findings.

The ultimate problem before the Court is the fitting of the provisions of a statute of national application to the activities of a particular employee in this giant agricultural operation. There are several phases of the fact picture on which the provisions of the Act might be pertinent:

(1) Farming operations, such as harvesting, to which Section 13(a)(6),[8] excluding from the operation of both wages and hours provisions of the Act "any employee engaged" in agriculture, as therein defined by Section 3(f),[9] might be applicable.

(2) Prevention of the spoilage of cane and preparation for delivery to market by processing to the point where raw (not refined) sugar is obtained, which might fall as work performed by a farmer on a farm in harvesting and preparing for market under section 3(f)[9] or might be excluded by Section 7(c)[10] as part of the processing of raw

---

[6] Alabama State Federation of Labor vs. McAdory, 325 U.S. 450, 460-2. See Atwater vs. Freeman, 319 U.S. 359, 363; United States vs. West Virginia, 295 U.S. 463, 475; Aetna Life Insurance Co. vs. Haworth, 300 U.S. 227, 240.

[7] Colegrove vs. Green, 328 U.S. 549, 552; Ashwander vs. Tennessee Valley Authority, 297 U.S. 288, 325. Cf. Great Lakes Dredge & Dock Co. vs. Huffman, 319 U.S. 293, 300; Nashville, Chattanooga & Louis Railway Co. vs. Wallace, 288 U.S. 249, 262.

[8] 29 U.S.C.A. § 213.

[9] 29 U.S.C.A. § 203.

[10] 29 U.S.C.A. § 207.

sugar or might be considered in part as the production of goods for commerce.

(3) Construction, conservation, repair and reconditioning of plant, irrigation systems, tools, agricultural machines, processing plants, instruments of transportation, which might fall under Section 13(a)(6), Section 7(c) or Section 3(j).[11]

(4) Construction, management, repair, reconditioning and operation of villages, which may not be included under the Act at all, and may, on the other hand, fall in part or in whole under Section 13(a)(6), Section 7(c) or Section 3(j).

Inasmuch as it is apparent that the work of an employee defendant might fall under any one of these various and highly diverse classifications or might in a particular week comprise a combination of duties under two or all of these classes, the necessity for specific findings becomes more and more clear. Such findings must be in terms of the hours of each work week and the nature of the duty performed in order to fix the kaleidoscopic changes which vary the picture as often as the duties of a single employee shift under the light of the statutory provisions.

In certain fields, where the Trial Court drew general conclusions, we are unable to speak without such specific and positive findings. But it is not the function of an Appellate Court to make findings on its own account. Besides, other difficulties intervene. The stipulation is in the form of testimony and would require the judgment of the Trial Court to weigh the whole and select proper portions for incorporation into findings. It is true the attorneys requested more specific findings as to employees. The able and conscientious Trial Judge was unable to

[11] 29 U.S.C.A. § 203.

make such findings owing to the posture of the case and the state of the record—a matter which will be hereinafter discussed. This is pointed out in the opinion of the lower court on file herein.

It is a necessity, in view of the fact that a purported declaration has been entered below, that it be specifically indicated what findings would be requisite to support a judgment. Such analysis follows:

The statement that "practically every person employed in the work of a sugar plantation in Hawaii is employed in 'commerce' as it is defined and dealt with in the Fair Labor Standards Act," is a conclusion of law and not an applicable finding of fact.[12] The only method of making binding findings upon this subject is to enumerate the exact duties of a particular employee for a specified period of time and apply the pertinent statutory provisions. The imperative need for detailed facts upon which to found positive declarations is found in the nature and purpose of the act and the exclusions. The humanitarian purpose of the statute to insure to the industrial workers a fair wage for a reasonable work week was here crystallized, as the learned District Judge pointed out.

But the raising and harvesting of sugar were specifically given consideration by Congress on account of the immense importance to the economy of this country as a whole. The text of the Act itself, the debates over the meaning of provisions, and especially the broad phrasing of the exclusions, indicates the intention that construction should be evenly balanced and not technical. The text re-

---

[12] Cf. Interstate Circuit Inc. vs. United States, 304 U.S. 55, 56. "The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact."

flects the feeling that, in troublesome times, the need for sugar may momentarily become vital. As to sugar, the all-year processing exclusion, in addition to the broad agriculturai exclusion, indicates strongly congressional intent. Not only was it the desire to exempt processing as a part of the harvesting done by a farmer or on a farm, but also processing done by a third party. These provisions are not alternative or mutually exclusive, and should be liberally construed for the reasons given by this Court in McComb vs. Hunt Foods, Inc., 9 Cir., 167 F.2d 905, 908. It must be remembered that the construction given to this Act by the Court as to Hawaii, although not conclusive, will be generally applied to wheat farms and sugar plantations in continental United States.

Agriculture and farming, as those terms are generally understood, are not interstate or foreign commerce. As has hitherto been pointed out by this Court in the case just cited above, these provisions relating to farming are exclusions, not technical exemptions to be construed in accordance with over-refined rules of pleading, but broadly and liberally as is demanded by the nature of the subject and the unquestionable intent of Congress. This factor is directly applicable to the individual employee because the Act specially provides that the statute shall not apply to any employee who is engaged in agriculture.

As a result of the basic inconsistency which has been pointed out before, vague phrases in the opinion of the District Court are particularly inept when relating to the activities of the employees concerned with the villages. It is probable it might be concluded, if a detailed finding of the work done by a particular employee in a particular week were made, that he had no connection with commerce or the production of goods for commerce, or it might be found that he was engaged in agriculture or processing of sugar cane. The wealth of detail which would have

been testified to by competent witnesses relating to the villages on the company property is such that it is extremely difficult to discover on what basis the Court believed many of these activities had any relation to interstate commerce.

Under the general conclusion that all employees of Waialua are engaged in commerce, the Trial Court necessarily holds that the carpenter who initially constructed a house for an army officer on company property and the beauty operator who works in a hotel for transients and the girl who takes tickets at the moving picture house are so engaged. If this be true, it would be stretching the bow very far. But we do not know that such employments exist, although "other employees similarly situated" might be construed to include such type work. But, in excepting to this conclusion contained in the opinion of the Trial Court, attorneys for appellant desire all employees blanketed under the agricultural exclusion, which, of course, would be just as improper. It is doubtful that many of these employees could be included in the agricultural exclusion. There may, on the other hand, be certain portions of such employment which would relate to retail or independent establishments under the statute, but the lack of findings hampers this Court to such an extent that we cannot deal with the situation. Scattered through the stipulation as to almost every one of the employees before the Court are statements to the effect that "he cuts firewood for use as fuel by plantation employees living in plantation villages." He "is engaged exclusively in cutting firewood for use as fuel by plantation employees living in plantation villages, repairing houses and pruning shade trees, etc." And again, "he may spend a day or two grading around * * * plantation housing areas preparatory to the construction of a new building or a house." Here a broad brush has been used, and there is no shading. If it were stated for what plantation employee the

firewood was cut, then there might be possibility of a definite conclusion, but we would have to know whether the firewood were a perquisite or whether it were paid in part as wages and whether it were a gift, dependent upon the relationship of the employee to the company.

The determination of how many angels could stand on the point of a needle would seem to have a firm foundation in fact, as compared with a determination of what relation the furnishing of firewood gratuitously to the village streetcleaner or tree trimmer around independent establishments of Waialua village has either to interstate commerce or to agriculture. But again, we do not know the facts. The finding in this regard might be based upon the evidence set up in the stipulation that some competent witness would testify to these facts:

> "Many non-plantation and independently owned and operated stores, shops, restaurants, service establishments and public schools and churches made their appearance on the plantation itself in and around the village of Waialua to serve the needs of plantation employees and their families living in the area."
> "The village of Haleiwa is a small business and residential community which is made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to plantation employees and to surrounding community residents, who include persons working at other locations on the island of Oahu and residents of numerous beach houses and Army and Navy personnel using beach recreational facilities."
> "Employees of the plantation as heretofore are continuing to render services and perform maintenance work on plantation houses and village areas."

The difficulties of proceeding without a firm basis of fact are highlighted by a consideration of the transportation. The activities of employees engaged in transportation are various, according to crystalized testimony. Some work of this type might be classified as wholly agricul-

tural, such as transportation to market, within the statutory exclusion. Some might be viewed as processing, if that be not also agricultural, and a portion might be considered as unrelated to commerce or production of goods for commerce. It is probable that no feasible distinction can be drawn under the language of the statute between carriage by motor truck, railroad locomotives or other modern devices, and by water buffalo with carts, as the statutory cleavages are on other lines. For the same reason, distinctions cannot be drawn on account of size. If a particular operation in transportation were done, according to the facts, by a farmer in harvesting, it would not fall under the statutory provisions even if the farmer were an agricultural giant such as Waialua. If the particular hauling is not done by a farmer or "on a farm" "as an incident to or in conjunction with" farming operations, such as harvesting, then the subsidiary questions arise as to whether the haulage is connected with excluded processing or with the production of goods for commerce at all. The pushing of loaded sugar and molasses cars from plant to siding of a carrier might be delivery to a carrier for transportation to market or a part of a processing operation, according to the surrounding circumstances, such as, for instance, the time at which the raw sugar is sold. The qualification of transportation of men over roads outside the Plantation, the carriage of supplies for the farm or for individual storekeepers or for construction or for the electric plant depends on facts in minute detail. The placing of certain activities in transportation or in the category of "preparation for market" or "harvesting" on the one hand, or on the other in the category of "processing" of sugar cane into raw sugar, demands meticulous consideration.

The gathering of the cane and transporting it on the farm and reducing it to a product which can be handled without loss probably bears some analogies to other farm-

ing. In the old days of thrashing operations in wheat with stationary thrashers, the header cut the grain and it was carried by elevators into header boxes and by the header boxes carried to stacks. Thereafter the stationary thrasher would move from one stack to the other and thrash out the grain and place it in sacks. If the farmer owned his own outfit and farmed his own land, it was all a part of the harvesting operation up to the point where the grain was in the bag. The facts, if found as regards sugar cane, would settle the question as to whether the operations were outlined on stipulation as part of "harvesting."

If it be that, to prevent deterioration, there must be direct and immediate delivery from the harvest field to the cane-cleaning plant for cleaning preparatory to crushing, the hauling might be placed upon the same basis as the other processes which are necessary to prepare agricultural products to prevent deterioration. Again, the thrashing operation with wheat, which is only a first step, may furnish a guide. Everyone realizes that, in order to be used, the wheat must necessarily be elsewhere milled into flour. Likewise, everyone realizes that, before the sugar is usable, it must be refined at another factory. The process of harvesting cane might end only with the bagging of the raw sugar, as the harvesting of wheat ends with the bagging of the grain. The disposal of the molasses, which is an incidental product, may be similar to the disposal of the straw and chaff, which is an incidental product in the wheat harvesting process. The facts themselves, if found as to a particular employee, dictate the application of the statute.

The stipulated evidence would seem to indicate that sugar cane is highly perishable and starts to deteriorate immediately after cutting. The same source would indicate that, to avoid serious losses, it must be processed

into sugar, syrup or molasses within a few hours after it has been severed from the ground, and that for this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown. It was agreed also that sugar cane never moves into interstate commerce in its natural state. But these are not solidified into findings so that it can be determined whether the hauling of the cane is harvesting, an activity performed on a farm in preparing an agricultural commodity for delivery to market or to storage, or an essential processing operation without which this farm product would have been lost or wasted.

The question as to the classification of workers who have to do with irrigation has recently been dealt with by the Supreme Court of the United States in The Farmers Reservoir & Irrigation Co. vs. McComb, Adm., U.S.S.C., June 27, 1949. There it was held that an irrigation system common to a great many farms which hired its own employees was under the provisions of the Fair Labor Standards Act and was not covered under the agricultural exception. But the Court there pointed out that in the particular case there was not an operation by a farmer or on a farm, but that it was a communal enterprise by several farms. The explanation for this case is the same as that of Colaf vs. Gonzales, 1 Cir., 127 F.2d 934, Bowie vs. Gonzales, 1 Cir., 117 F. 2d 11, 123 F.2d 387, and the opinion of this Court in North Whittier Heights Citrus Assn. vs. National Labor Relations Board, 9 Cir., 109 F.2d 76. While it is probable The Farmers Reservoir opinion only highlights the exclusion of the worker who deals exclusively with irrigation on the farm of this single owner as one engaged in agriculture, the implications as to those who construct the canals and those who may work off the farm, if there be any, must be settled by reference to the actual facts.

It is impossible for this Court to rule in this state of the record and without findings as to specific employees, specific work, specific time and exact results on timekeepers, warehousemen, material clerks, laborers who load stones on conveyances in the fields and machinists at the mill, activities in construction and maintenance, employment, part or full time, in operation, maintenance and repair of equipment, burning of bagasse, generation and distribution of electricity, the cleaning and repairing of a mill or machinery and equipment, the hauling of supplies and equipment by motor truck and maintenance and repair thereof, the shoeing of horses and mules, maintenance and repair of buildings and grounds, and clerical employees. We believe many of these activities are shown by the testimony indicated in the stipulation to be excepted from the statute. But we cannot make findings of fact.[13]

Since the cause must be remanded then for exact findings, it will be pertinent for the District Court to determine whether there is a justiciable controversy, as above noticed, and also whether in any event a declaratory proceeding should be entertained. For the difficulty in crystalizing findings of fact did not arise from ineptness or recalcitrance of the learned Trial Judge, but from the course of the proceedings and the attitude of the real litigants.

The form of proceeding chosen by plaintiff was a declaratory judgment. This was unfortunate since generalities rather than concrete and exact definition of facts result from such a proceeding. Furthermore, since the proceeding is nebulous in form, the uncritical user may believe that any type relief can be obtained therein. But on top of the declaratory proceeding was superimposed the

---

[13] Kelley vs. Everglades Drainage District, supra; Ford Motor Co. vs. National Labor Relations Board, 305 U.S. 364, 373.

joinder of and prayer for relief against all similarly situated. A blanket declaration of exclusion of all employees was sought. Then Waialua seemed to consider itself as representative of all its feudally organized brethren. Joined as defendants were the Union and its Regional Director, although no relief is sought against either. These latter appeared to have slight, if any, interest in the particular individual defendants, for they had in contemplation much broader issues. All the defendants, including these individual employees, appeared by the same counsel. But the moving actors were the Union and the director on one side and the "representative" Plantation on the other. The answer prayed likewise for a declaration in broad terms.

The record shows that none of the individual employees was called upon to testify in the case. No one of them was called to establish his work record in any particular week. Nor was any of them ever called to establish that he worked overtime. So far as the record indicates, no employee of the Plantation was ever in Court. Perhaps these minor characters could not be trusted in this litigation of the demigods. In any event, the major players seemed to have treated them as pawns.

The individual defendants and the duties of each are described in the stipulation, but with such broad strokes that individual characterization was obliterated and a composite portrait of some characteristics of an assumed worker achieved. The basis of findings of fact was here destroyed.

The record in the case consisted of the agreements of the stipulation, in which, undoubtedly, the Plantation and its operations and activities are described in great detail albeit it may be said with a very kind voice. There were injected into the record pamphlets entitled "Labor in the Territory of Hawaii" and "The Economy of Hawaii,

1947." The Regional Director of the Union testified he could not personally swear as to the operations at the installation of plaintiff, but that he had intimate knowledge of the condition on other plantations on the island and the character of the work done there. Notwithstanding he testified using the stipulation as a guide as to how various general functions of employees were performed throughout the Plantation on the island. An example of his method is contained in the following expression:

> "I must confess, your Honor, that this legal argument leaves me a little cold. I am trying to indicate in these job descriptions where they are incomplete and where they are misleading. And in the case of No. 42, Augustine Lorenzo, the description indicates that all of the water is used exclusively for irrigation purposes. Employees similarly situated on many of the plantations are handling water that is also used for mill purposes."

It is true the attorney for Waialua objected to this particular testimony, but he had already set the stage by the course of the proceeding up to that time. The net result was an attempt to lay foundations for an essay upon the economy of Hawaii or on labor conditions in Oahu. While the semi-feudal organization of industry and agriculture upon the plantations of this semi-dependent archipelago present a national problem, there should be no attempt to settle them on the basis of an agreed record between a single plantation and a labor organization.[14] Especially is this true where the rights of the individuals involved are utterly disregarded, notwithstanding the express lan-

---

[14] The situation has not been aided on appeal so far as clarity is concerned by the intervention amici curiae of the Administrator of the Department of Labor, who takes a Janus-like position, and the American Farm Bureau Federation of the United States of America and American Sugar Cane League of the United States of America, Inc., since none of them discuss the matter on the record or with relation to the particular defendant employees.

guage of the statute. The danger is that, by agreeing as to this course of conduct, a precedent might be established for the settlement of problems on the mainland which does not have the peculiar problems of Hawaii.

The intention of the real litigants to make this a case upon which a general advisory opinion would be written appears in the discussions over the admissibility of certain testimony. The disregard of the employees themselves, who are the individuals whose interests are affected, is undisguised. The attorney for the Union says:

> "It isn't our purpose in this declaratory relief case to just get a determination for Waialua. That wouldn't solve anything. You'd have 30 odd other plantations that would still not have any authoritative statement as to where coverage lies and where it ends. The purpose of this proceeding was to get, first of all, a plantation which was sufficiently and substantially typical and representative, so that the decision in that case would apply to the rest of the industry. And that's why Waialua was picked out."

It will be noted then that this expression indicates that this action was brought by agreement between Waialua and the Union. The attempt was to dispose of it upon terms of agreement between these two and thereby compromise the rights and interests of hundreds of employees who would not themselves be permitted even to compromise their own coverage.[15]

The Trial Court should then consider as to whether there is any real adverse interest between the parties who are actually conducting the litigation.[16] For in the absence of real controversy between the actual parties, the stipulation, which practically dictates the judgment, ren-

---

[15] D. A. Schulte, Inc. vs. Gangi, 328 U.S. 108, 116.

[16] United States, et al, vs. Johnson, 319 U.S. 302, 304; Coffman vs. Breeze Corporations, Inc., et al, 323 U.S. 316, 324-5.

ders the case moot.[17] The Court should consider that there is no power to render opinions merely advisory[18] or to decide moot questions[19] or to set precedent for future litigation.[20] It is of great importance that the rights of third parties might be prejudiced by a declaratory judgment in this case even if founded upon proper findings.[21]

Refusal to entertain a petition for declaratory judgment is peculiarly within the discretion of the Trial Court.[22] If a "concrete set of facts" would be supplied to which the statute could be fitted and thereby "an adequate and effective judgment" rendered,[23] it would be proper to proceed. For such a judgment would satisfy the necessity of firmly founded fact findings[24] and the elements requisite for a plea of res judicata[25] in subsequent litigation. It

---

[17] Paradise Land & Livestock Co. vs. Federal Land Bank of Berkeley, 10 Cir., 147 F.2d 594; Buck's Stove & Range Company vs. American Federation of Labor, 219 U.S. 581; Dakota County vs. Glidden, 113 U.S. 222, 223-4.

[18] St. Pierre vs. United States, 319 U.S. 41, 42.

[19] United States and Interstate Commerce Commission vs. Alaska Steamship Company, 253 U.S. 113, 115.

[20] United States vs. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 475-7.

[21] Lord vs. Veazie, 8 Howard 251, 255-6. See also Meeker vs. Straat, 38 Mo. App. 239, 243; Ward vs. Alsup, 100 Tenn. 619.

[22] Franklin Life Ins. Co. vs. Johnson, 10 Cir., 157 F.2d 653, 656.

[23] Alabama State Federation of Labor vs. McAdory, 325 U.S. 450, 468.

[24] Creamery Package Mfg. Co. vs. Cherry-Burrell Corporation, 3 Cir., 115 F.2d 980, 983, Cert. den. 312 U.S. 709; Interstate Circuit, Inc. vs. United States, 304 U.S. 55, 56.

[25] Pierce vs. Kunkel, 5 Cir., 151 F.2d 897, 898.

would remove the suspicion of an advisory opinion[26] dealing with "assumed potential invasions" of rights[27] and an academic pronouncement[28] instead of a definitive judgment. However, we leave this as a suggestion only and not as a direction.

Unfortunate as the consequences of remand may seem, it would be still more unfortunate for this Court to write a treatise without fact foundation. Other courts would then be required to guess similarly without foundation. The cause is therefore remanded for further proceedings in accordance with this opinion, either for dismissal for the reason that no ground has been shown for entry of a declaratory judgment or to permit the entry of detailed findings as to each employee defendant, based upon an adequate record. The judgment herein, which is in the form of a manifesto or at most of a legislative enactment or an administrative rule, is set aside.

Remanded for further proceedings.

(Endorsed:) Opinion. Filed Nov. 10, 1949. Paul P. O'Brien, Clerk.

---

[26] This caution is heavily reinforced by the language and action of this Court in Imperial Irrigation District vs. Nevada-California Electric Corporation, 9 Cir., 111 F.2d 319, 321, 322. To like effect, Johnson vs. Interstate Transit Lines, 10 Cir., 163 F.2d 125, 130.

[27] Ashwander vs. Tennessee Valley Authority, 297 U.S. 288, 324; Arizona vs. California, 283 U.S. 423, 462.

[28] Johnson vs. Interstate Transit Lines, 10 Cir., 163 F.2d 125, 130.